

Missouri Attorney General's Opinions - 1962

Opinion	Date	Topic	Summary
3-62	Jan 10	INHERITANCE TAX WAIVERS.	The decision of the Missouri Supreme Court in the case of Estate of Osterloh v. Carpenter does not affect the waiver requirements contained in Section 145.210, M.S.R.
4-62	Feb 21		Opinion letter to the Honorable James P. Landis
5-62	Jan 5	JUVENILE OFFICERS. DEPUTY JUVENILE OFFICERS. COMPENSATION.	<p>1. It is mandatory that the judge of a judicial circuit comprised of third and fourth class counties appoint a juvenile officer or enter into an agreement under which such an officer is appointed for his circuit and one or more other circuits.</p> <p>2. It is permissible for a deputy juvenile officer to be appointed when no appointment of a juvenile officer for the circuit has been made.</p> <p>3. A deputy juvenile officer, although appointed for an entire circuit, may be designated to serve one specific county within a judicial circuit at the exclusive discretion, and under the direction and control of the juvenile court for the circuit.</p> <p>4. The salary and expense of deputy juvenile officers serving third and fourth class counties comprising a judicial circuit must be prorated amongst all of the counties of the circuit according to their population, regardless of how or where such deputies are directed to serve by the court.</p>
7-62	June 6	INCOME TAX.	In the interpretation of the meaning of "gross income" as used in Section 143.170, the term should be limited to "income" as defined in Section 143.100.
8-62	Mar 15		WITHDRAWN
10-62	Apr 11	VOTERS. REGISTRATION OF VOTERS.	A registered voter in Class II, III and IV counties whose name is changed must reregister in order to vote. Such person may reregister at any time. County Clerk shall not cancel or reinstate any registration within five days prior to election except by order of Circuit Court.
11-62	Apr 18	LIBRARY. CITY LIBRARY. COUNTY LIBRARY DISTRICTS.	County Library Districts and City Libraries established under Chapter 182 RS 1959 are required to prepare annual budgets under the provisions of Chapter 67 Cum. Supp. 1961.
15-62	Feb 16	CIGARETTE TAX.	Cigarette tax paid by wholesaler on cigarettes sold by him and later returned may be refunded to wholesaler in certain circumstances.
17-62	Mar 1		Opinion letter to the Honorable Joe H. Miller

18-62	Mar 22	ELECTIONS. CITIES, TOWNS AND VILLAGES. MUNICIPAL CORPORATIONS. CONSTITUTIONAL LAW.	No election may be held in the City of Hannibal to name city officials on a partisan basis pursuant to the charter amendment of August 22, 1961, prior to the second Tuesday in April, 1963, the next regular election date.
19-62	Mar 26		Opinion letter to the Honorable Stephen E. Strom
20-62	Apr 2		WITHDRAWN
21-62	Feb 21	COUNTY TREASURERS. COUNTIES. COMPENSATION.	County treasurers in class 3 and 4 counties under township organization are entitled to compensation as provided under Section 54.275, RSMo 1959, in addition to compensation they are entitled to receive under Section 54.320, RSMo 1959.
22-62	Mar 27	SCHOOLS. SCHOOL BOARDS. VACCINATIONS. PHYSICIANS. PHYSICAL EXAMINATIONS. DENTISTS. DENTAL EXAMINATIONS. SCHOOL COURSES.	(1) School boards may make rules and regulations requiring compulsory vaccination only where there is a threat of epidemic or an actual epidemic. (2) School boards may make rules and regulations requiring tuberculosis and general physical tests by a physician to determine existence of contagious or infectious diseases. (3) School boards may not require a dental examination by a dentist as a prerequisite to attendance in school, because a dentist is not a physician. (4) A school board may require a child in secondary school to take certain health courses as prerequisites to graduation.
23-62	Jan 26	COUNTY PLANNING COMMISSION. COUNTIES OF THIRD AND FOURTH CLASS.	Areas within a municipality that has not enacted a city plan should be included in the county master plan.
24-62	Feb 8	COUNTY COURT. COUNTY CLERK. PAYMENT OF WARRANTS. COUNTY RECORDS.	A contract made with a county court for services to be rendered the county must be in writing subscribed by the parties thereto with the consideration state therein and entered on the records of the county court.
26-62	Mar 19	CORPORATIONS. NON-VOTING COMMON STOCK. CONSTITUTIONAL LAW. CONSTRUCTION OF CONSTITUTION.	A Missouri Corporation under or subject to the General and Business Corporation Law may validly issue a class of non-voting common stock. The issuance of such non-voting common stock is not in violation of Article XI, Section 6 of the Constitution or of any statutory provision.
28-62	Mar 30	PUBLIC SCHOOL	Refund or withdrawal of accumulated contributions in teachers'

		RETIREMENT SYSTEM. TEACHERS' RETIREMENT SYSTEM. CONTRIBUTIONS. BENEFITS.	Retirement System are not included in the term “monetary benefits” as used in paragraph 9 of Section 169.070, RSMo, Cum. Supp. 1961.
29-62	Mar 6	MOTOR VEHICLES. TRUCKS.	The driver of a truck or bus may not be charged with a crime of violation of either Sec. 304.017 or Sec. 304.044.2 when following a vehicle other than another truck or bus.
30-62	Jan 19	COLLECTOR OF REVENUE. COUNTIES. COUNTY OFFICES.	Requirement that county provide facilities and items enumerated in Section 49.510 should prevail over requirement of Section 52.270 that collectors in counties included in classification of Section 52.260(14) should pay expenses of his office and other costs of collecting the revenue, as to items and facilities enumerated in 49.510.
31-62	Apr 4	SALARIES AND FEE. MAGISTRATE FEE. MAGISTRATE COURT FEE. FIRST CLASS COUNTIES. WHEN COLLECTABLE.	1. Sec. 66.110, RSMo 1959, providing for a fee of two dollars and fifty cents in each case involving violation of a county ordinance, is applicable to St. Louis County magistrate courts. Said fee shall be collected in each county ordinance case instituted in any magistrate court of such county. 2. Sec. 483.610, RSMo 1959, providing for collection of five dollar magistrate court fee in each criminal proceeding and in each preliminary hearing instituted in any magistrate court, is applicable to St. Louis County magistrate courts. Said fee shall be collected only in each criminal case instituted in a magistrate court of said county. 3. Sec. 482.250 RSMo Cum. Supp. 1961, applies in cases other than criminal proceedings and cases involving county ordinances. The fee provided for in the section is collected by magistrate courts of St. Louis County only in such cases.
33-62	Jan 12		WITHDRAWN
36-62	Jan 18	SAVINGS AND LOAN ASSOCIATIONS.	Savings and loan associations subject to provisions of Chapter 369 RSMo 1959 have no express or implied power to service loan agreements of business corporation which effect the collection of loan contracts which the business corporation was instrumental in effecting between borrower and lender, when such loan contracts at no time become the property of the savings and loan association.
37-62	June 15		Opinion letter to Mr. John A. Hailey
38-62	Feb 15	MOTOR VEHICLES. BICYCLES. MOTORCYCLES. DEPT. OF REVENUE. LICENSES.	A motor-power-assisted bicycle that is capable of propelling itself on horizontal planes but not fully capable of propelling itself on upgrades is a motor vehicle, and this is a question of definition under Section 301.010, rather than classification under Section 301.070, RSMo 1959.

39-62	Jan 3		Opinion letter to the Honorable William B. Milfelt
40-62	June 22		WITHDRAWN
42-62	Mar 26		Opinion letter to the Honorable David J. Dixon
44-62	May 10		Opinion letter to the Honorable Ray G. Cowan
47-62	Jan 9		Opinion letter to Mr. Roderic R. Ashby
49-62	Jan 12	TOILETS. SANITATION. COSMETOLOGY, BOARD OF. REGULATIONS. ADMINISTRATIVE LAW.	The power to adopt sanitary rules as set forth in Section 329.210, RSMo 1959, does not confer upon the State Board of Cosmetology the authority to require establishments coming within its jurisdiction to install toilet facilities.
51-62	Jan 18	RETIREMENT. STATE RETIREMENT SYSTEM. STATE EMPLOYEES. UNIVERSITY OF MISSOURI.	University of Missouri may amend its Retirement Plan to include its employees who are members of the State Employees' Retirement System, and thereby terminate their membership in the State System. The University Retirement Plan may allow an employee, who is a member of the State Employees' Retirement System, to elect on the date he would otherwise become a member of the University Retirement Plan, to remain in the State Employees' Retirement System.
52-62	Mar 2	STATE RETIREMENT SYSTEM. LEGISLATURE. RETIREMENT.	On or after October 13, 1961, a member of the Missouri Employees' Retirement System who retires after his 65 th birthday with six years' service as a member of the general assembly is entitled to a minimum annuity of \$25.00 per month per term.
53-62	Apr 11	BUDGETS. POLITICAL SUBDIVISIONS.	Political subdivisions referred to in Chapter 67, RSMo Cum. Supp. 1961, making expenditures without full compliance with such law causes those expenditures to be illegal.
55-62	Jan 25	TAXATION OF PERSONAL PROPERTY. ASSESSOR. CITY OF ST. LOUIS.	Tangible personal property located in the City of St. Louis, owned by a resident of another county, must be assessed in the county where the owner resides and not in the City of St. Louis (except houseboats, cabin cruisers and automobile trailer houses used for lodging).
56-62	Apr 12	TAXATION. SALES TAX. PUBLIC SERVICE COMMISSION. PUBLIC UTILITIES.	A consumer of services sold by utilities is responsible for paying sales tax upon the total amount charged. This obligation is not changed by the utility billing its customers with a basic charge plus a charge for defraying a local license tax – the two charges equaling the total amount paid for the service.
57-62	Feb 15	MAGISTRATES.	Additional magistrate in Clay County, Missouri authorized by order of

		BOARD OF ELECTION COMMISSIONERS. REDISTRICTING MAGISTRATE DISTRICTS. COUNTIES OF SEVENTY TO ONE HUNDRED THOUSAND.	Circuit Court under authority of Section 482.010, does not automatically become the second regular magistrate to which the county is now entitled by virtue of its population; effective as of January 1, 1963, there will no longer be any additional magistrate in Clay County; no particular period of residence in the district from which he is elected is required of a magistrate in order to qualify for the office.
58-62	Jan 22		Opinion letter to the Honorable Dan Hale
61-62	Jan 9		Opinion letter to the Honorable Vernon E. Betz
66-62	Jan 10	INSURANCE.	Articles of Incorporation of Town and Country Security Life Insurance Company.
67-62	Jan 10	INSURANCE.	Articles of Incorporation of Kansas City Casualty Company
71-62	Mar 8		Opinion letter to the Honorable Warren C. Phelps
73-62	Jan 17		Opinion letter to the Honorable Richard E. McFadin
74-62	Feb 21	CONVICTS. CITIZENSHIP. NOTARY PUBLIC. PAROLE. CRIMINAL LAW.	A person is disqualified from holding the office of notary public if such person has been convicted of forgery in violation of Section 561.011, RSMo. 1959, and such person has been sentenced to imprisonment and granted a judicial parole on the day of conviction and sentence and if said person has not been finally discharged from such judicial parole.
75-62	Mar 8		Opinion letter to the Honorable George H. Morgan
81-62	Jan 18		Opinion letter to the Honorable Anthony D. Pickrell
82-62	Feb 28	MARRIAGES. MINISTERS. MARRIAGE LICENSES.	A marriage may not be solemnized in Missouri unless a license for such has been obtained from a proper official in this state; marriages solemnized in Missouri on the basis of a license issued in another state are invalid.
85-62	Mar 5	ELECTIONS. SCHOOL DISTRICTS. VOTERS. POLLING PLACE.	Voters in the school election in the School District of St. Joseph may not vote at a regular polling place for the regular municipal election in the City of St. Joseph, which polling place is outside the limits of the School District of St. Joseph.
87-62	Dec 27		Opinion letter to the Honorable Phil Hauck
88-62	Jan 26		WITHDRAWN
89-62	Feb 6		Opinion letter to the Honorable Don E. Burrell
90-62	July 10	MENTAL DISEASES. STATE HOSPITAL.	1. Division of Mental Diseases authorized to transfer patient from State Hospital to the Veterans Administration when authorized by

			Director of Division of Mental Diseases and to pay expenses incurred in making transfer. 2. Employees of Division of Mental Diseases have no authority to return a patient from another state who has escaped from hospital in this state.
93-62	Feb 13		Opinion letter to the Honorable F. Neil Aschemeyer
94-62	Dec 11		WITHDRAWN
95-62	Mar 6		Opinion letter to the Honorable Rolin T. Boulware
96-62	Mar 9		Opinion letter to the Honorable Robert A. Young
97-62	May 28		WITHDRAWN
99-62	Mar 30	CEMETERIES. CEMETERY ENDOWED CARE FUND LAW. RELIGIOUS ORGANIZATIONS.	Cemetery Endowed Care Fund Law (Sec. 214.270-214.410, RSMo 1961 Supp.) applies to a religious organization operating a cemetery and which makes occasional sales to persons who are neither members of the organization nor in the immediate families of such members. The fact that the purchasers may be of the same religious faith as the members is wholly irrelevant, inasmuch as the statute contains no such exception.
100-62	Feb 19		Opinion letter to the Honorable Earl R. Blackwell
102-62	June 29	CITIES, TOWNS & VILLAGES. TAXATION. PARKS. RECREATION. ELECTIONS.	3rd class cities levying 80 cents tax for municipal purposes and 20 cents for park purposes may vote tax levy for recreational purposes. Combined levy for park and recreation not to exceed 20 cents.
103-62	Apr 23	JUNIOR COLLEGE DISTRICTS. SCHOOLS. SCHOOL DISTRICTS. STATE AID.	1. School districts operating junior colleges do not have to meet organizational standards but must meet all other standards before being eligible to receive state junior college aid under Sec. 165.830, RSMo Cum. Supp. 1961. 2. Such school districts are entitled to state junior college aid for the school year from July 1, 1961 to June 30, 1962, with the amount of such aid to be computed on the basis of the number of semester hours completed by all students in such junior college during the preceding year from July 1, 1960 to June 30, 1961.
105-62	July 10	WILLS. PROBATE COURT.	The Probate Court must keep the original will permanently in its files.
113-62	Mar 19		Opinion letter to the Honorable W. D. Hibler, Jr.
116-62	Mar 1		Opinion letter to the Honorable Norman H. Anderson

119-62	Mar 15		Opinion letter to the Honorable Charles A. Weber
120-62	July 5		Opinion letter to the Honorable Norman H. Anderson
121-62	Feb 20		WITHDRAWN
122-62	Mar 12		Opinion letter to Mr. Charles D. Trigg
123-62	Feb 28		Opinion letter to the Honorable Stephen E. Strom
126-62	Aug 14		Opinion letter to the Honorable Garner L. Moody
132-62	Mar 20		Opinion letter to the Honorable William J. Esely
133-62	Mar 12	INSURANCE.	Articles of Incorporation of Continental Security Life Insurance Company.
135-62	Apr 5	INSURANCE.	Membership Certificate No. 7799 negotiated by Jimmy Osburn Burial Service Association of Pemiscot County, Missouri, evidences an insurance contract and persons negotiating such agreements without being duly licensed by the State Division of Insurance are amenable to penalties prescribed in Secs. 375.300 and 375.310, RSMo. 1959.
139-62	Aug 20	SCHOOLS. SCHOOL DISTRICTS. SCHOOL BOARDS. CONTRACTS. BIDS. BIDDING ON CONTRACTS. PUBLICATION. ADVERTISING FOR BIDS.	Boards of education of school districts in the state of Missouri are not included within the meaning of the terms "officer or agency of this state" as that term is used in Section 8.250, RSMo 1959.
141-62	July 10		Opinion letter to the Honorable Bill Davenport
142-62	May 25	RECORDER OF DEEDS. FEES AND SALARIES. COMPENSATION. VETERAN'S DISCHARGES.	The recorder in third class counties is required and permitted to furnish only one free copy of a veteran's discharge on his request to be paid for by the County Court, if such discharge has been recorded, and the recorder is permitted to retain the one 50¢ fee for each discharge so furnished.
144-62	Apr 3		Opinion letter to the Honorable John E. Downs
147-62	Mar 26		Opinion letter to the Honorable Basil V. Jones
148-62	Mar 30	INSURANCE.	Articles of Incorporation of Central Allied Life Insurance Company.
150-62	Apr 3		Opinion letter to the Honorable J. R. Eiser
156-62	Apr 18		Opinion letter to Mr. June R. Rose

158-62	Apr 3		WITHDRAWN
159-62	Apr 18	CANDIDATE. BALLOT.	The “full name” of a candidate appearing on an official ballot may when warranted include prefix “Mrs.” and suffix “Sr.” and “Jr.” but may not use prefix “Dr.” for a doctor included in Section 564.290 RSMo.
161-62	Aug 2		WITHDRAWN
164-62	Apr 13		Opinion letter to the Honorable Warren E. Hearnese
165-62	Apr 5	INSURANCE.	Articles of Incorporation of Permanent Life Insurance Company
166-62	May 17	CIRCUIT COURT. COUNTIES. JUVENILE OFFICERS. JUVENILE COURTS. OFFICE EXPENSES.	Third and fourth class counties, comprising one or more judicial circuits and served by juvenile officials appointed by the Circuit Court, must pay office expenses of said juvenile officials, which are approved by the Circuit Court, by prorating said expenses among the counties served upon a ratio determined by population of the respective counties.
172-62	Apr 19	COLLECTOR, CITY. COLLECTOR, COUNTY. COUNTIES.	Collector of city of third class responsible for collection of delinquent real estate tax of such city. County collector under no duty to collect delinquent real estate taxes in city of third class.
173-62	June 5	DRIVER’S LICENSE. INTOXICATION TEST.	A. The refusal of a resident of Missouri to submit to an intoxication test does not constitute a ground for revocation of his driver’s license in this state. B. The driver’s license of a resident of Missouri cannot be revoked if he is acquitted in another state of an offense committed in another state.
177-62	May 21	JURORS. CIVIL COSTS. TAXATION OF JURORS’ FEES.	Section 494.160, RSMo 1959, governs the taxing of jurors’ fees in civil cases in St. Louis County. Section 497.185 has no application whatever to St. Louis County.
179-62	July 6		Opinion letter to the Honorable Stephen E. Strom
181-62	July 31	ELECTIONS. ELECTION JUDGES. BALLOT BOXES.	Ballot boxes in third and fourth class counties must be locked in order to comply with the requirements of Section 111.610, RSMo 1959, that they be securely closed and that the election judges are responsible for locking the ballot boxes.
182-62	Sept 12	EXTRADITION. WRITTEN WAIVER. WHO MAY TAKE.	Sec. 548.260, RSMo 1959, on waiver of criminal extradition, must be signed and consented to in the presence of a judge as provided in said section and does not authorize police officers to take such waivers from the accused.
183-62	May 2		Opinion letter to the Honorable George H. Pace
184-62	May 1		Opinion letter to the Honorable Lewis B. Hoff
185-62	May 29	TAXATION.	Macon Country Club property is not within exemption clauses of Sec. 137.100 RSMo 1959 exempting real and personal property from

			taxation for state, county or local purposes.
186-62	May 24	CRIMINAL LAW. MISDEMEANOR. DRUNKENNESS. INTOXICATION. DISORDERLY. STATUTES.	The disorderly condition and the drunken or intoxicated condition of a defendant must both be plead and proven for a prosecution and conviction under Section 562.260, RSMo 1961, Cumulative Supplement.
188-62	June 7		Opinion letter to the Honorable Stephen E. Strom
189-62	Apr 26		Opinion letter to Mr. V. H. Simon
190-62	May 23		Opinion letter to the Honorable E. J. Cantrell
193-62	July 13	CONSTITUTIONAL LAW. SPECIAL CHARTER TOWN. VILLAGE. MAY BECOME CONSTITUTIONAL CHARTER TOWN AND CONSTITUTIONAL CHARTER VILLAGE WHEN.	Meaning of "city" in Section 19, Article VI, Constitution of Missouri includes town and village. A Special Charter town incorporated prior to 1875 Missouri Constitution, with more than 10,000 population may become constitutional charter town by following procedure of said Section 19, Article VI, Constitution of Missouri. A village having more than 10,000 population may become constitutional charter village by following procedure of above mentioned constitutional provision.
194-62	June 12	INSURANCE.	Articles of Incorporation of National Security Life Insurance Company.
196-62	June 22	JUSTICE OF THE PEACE. MAGISTRATES. OFFICERS. VACATING OFFICE.	1. Resignation from the office of justice of the peace served to create a vacancy in the office. 2. A person not a lawyer who had neither served as a justice of the peace for four years prior to nor had been serving as a justice of the peace on the adoption of the 1945 Constitution, cannot qualify to serve in the office of magistrate.
198-62	May 1		Opinion letter to Charles B. James
199-62	Aug 10	HOURS OF FEMALE EMPLOYMENT. FEMALE EMPLOYERS. WORKING HOURS.	The provisions of Section 290.040, RSMo 1959, stating that no female employed by certain named industries shall work more than 9 hours during any one day, or more than 54 hours during any one week, may not be waived by an individual female employee covered thereunder.
200-62	Sept 10	PROSECUTING ATTORNEYS. ENFORCEMENT OF SUPPORT LAW.	Under Missouri Uniform Reciprocal Enforcement of Support Law, Chapter 454, RSMo 1959, prosecuting attorney has mandatory duty to seek appropriate orders of execution and garnishment when a cause has been forwarded to and docketed in Missouri.

204-62	May 2		Opinion letter to the Honorable Charles A. Powell, Jr.
206-62	Oct 9	INSURANCE.	Within described certificate of membership offered by American Health & Welfare Association is a contract of insurance, and offering the same to the public without complying with the insurance laws of Missouri constitutes a violation of Sections 375.300 and 375.310 RSMo 1959.
210-62	June 5		Opinion letter to the Honorable Francis Toohey, Jr.
211-62	May 17		WITHDRAWN
212-62	Sept 5		Opinion letter to the Honorable William B. Milfelt
213-62	June 4	CRIMINAL COSTS. ACQUITTAL. INSANE DEFENDANT.	State is liable for costs in capital cases and those in which imprisonment in penitentiary is sole punishment, if the defendant is acquitted, even though the defendant is acquitted on the sole ground of insanity.
216-62	June 13		Opinion letter to the Honorable Clyde F. Portell
217-62	July 25	SCHOOL DISTRICTS. SCHOOL TEACHER RETIREMENT AGE. TEACHERS' FUND. SUBSTITUTE TEACHER.	Teachers' salaries must be paid from fund provided in Sec. 165.110, RSMo 1959. In school districts in this state not in cities that have a population of 75,000 or more, teacher is retired July 1 next after attaining age 70 and may thereafter teach only under provisions of Sec. 169.560; school board may not legally pay teacher's salary from fund provided in Sec. 165.110 past July 1 next after teacher has reached age 70 except under provisions of Sec. 169.560; school board may not legally contract with teacher who is retired by provisions of Sec. 169.060 except under provisions of Sec. 169.560.
218-62	Sept 20	EMPLOYMENT AGENCIES.	Frederick Chusid & Company is a private employment agency and required under Section 289.010, RSMo 1959, to be licensed by the state.
220-62	May 21		Opinion letter to the Honorable Edgar J. Keating
222-62	Aug 28		WITHDRAWN
223-62	June 12		Opinion letter to the Honorable John M. Dalton
224-62	June 6	CRIME. MISDEMEANOR. LAND. REAL PROPERTY. FIRE.	An individual who sets a fire on his own land, which spreads to the land of another, may be prosecuted for a misdemeanor under Section 560.585, RSMo 1959, only if he <u>knowingly and negligently</u> permitted said fire to burn uncontrolled on his own land and allowed it to spread to the land of another.
225-62	June 5		Opinion letter to the Honorable Jack L. Clay
228-62	May 24		Opinion letter to the Honorable Shandy A. Stewart

232-62	June 18		Opinion letter to the Honorable Don E. Burrell
236-62	Aug 22	SOCIAL SECURITY. CITY COLLECTOR. EMPLOYEE.	The city collector of Jackson, Missouri, is an employee of such city and subject to OASI coverage under the agreement between such city and the State.
249-62	June 26	INSURANCE.	Articles of Incorporation of Farm and Home Insurance Company.
251-62	June 12		Opinion letter to Mr. Sidney B. McClanahan
253-62	June 21		Opinion letter to Mr. George H. Morgan
256-62	July 27	LEGISLATIVE DISTRICT COMMITTEE. CONGRESSIONAL DISTRICT COMMITTEE.	(1) The committeemen and committeewomen of the several townships and of Ward 21 which are included in whole or in part in a legislative district of Clay County compose the legislative district committee for such legislative district. (2) There is no requirement that either the chairman or vice-chairman of a legislative district committee reside within the legislative district for which he or she is chairman or vice-chairman. (3) The chairman and vice-chairman of the county committee, the chairman and vice-chairman of each of the three legislative districts into which Clay County has been divided and the committeeman and committeewoman elected in the 21st Ward of Kansas City, constituting a part of Clay County, are, by virtue of their election as such, members of the Sixth Congressional District Committee.
261-62	June 26	INSURANCE.	Articles of Incorporation of Midwest National Life Insurance Company
262-62	July 11	MOTOR VEHICLES. HIGHWAY DEPARTMENT. STATE HIGHWAY DEPARTMENT. AGRICULTURAL IMPLEMENTS. ROAD MACHINERY. ROAD MATERIALS. PERMIT FOR OPERATION OF MOTOR VEHICLES TEMPORARILY TRANSPORTING.	A hauler regularly transporting motor vehicles carrying agricultural implements or road making machinery or road materials must obtain permit if dimensions exceed statutory authorization. No permit required for such hauler not regularly engaged in such transporting.

263-62	Sept 17		Opinion letter to the Honorable John Hosmer
264-62	July 5		Opinion letter to the Honorable Stewart E. Tatum
266-62	July 5	CONSTITUTIONAL AMENDMENT. ST. LOUIS BOROUGH PLAN. BOROUGH PLAN.	Ballot title for constitutional amendment by initiative petition relating to the so-called Borough Plan uniting the City of St. Louis and St. Louis County to be submitted to the voters on November 6, 1962.
267-62	July 6		Opinion letter to the Honorable George H. Morgan
270-62	Nov 13	JUVENILES. JUVENILE COURTS. TRAINING SCHOOLS. BOARD OF TRAINING SCHOOLS. MINORS. CHILDREN. PARENTAL RIGHTS. SERVICE.	Juvenile court cannot commit boy over 17 to State Training School even if child is under jurisdiction of court. Juvenile court may exercise jurisdiction over child for violation of law when child has been paroled by State Board of Training Schools. After filing a petition for termination of parental rights, parents must be notified of right to counsel, and counsel appointed if parents cannot employ same. Parents in federal prisons outside Missouri summoned by mail or personal service as provided in Sec. 506.160.
271-62	Oct 18	GUARDIANS. INCOMPETENTS. PROBATE COURTS.	(1) Upon the death, removal or resignation of a guardian of an incompetent it is not necessary to have a second application and a rehearing on the question of competency in order to appoint a successor guardian. (2) Confinement in a state mental hospital does not constitute an adjudication of incompetency which will authorize the appointment of a guardian.
280-62	Nov 13	PUBLIC IMPROVEMENTS. GASOLINE TAX. ORDINANCES. CITIES, TOWNS AND VILLAGES. STREETS. HIGHWAYS.	City Councils of third class cities may delegate authority to their street committees to determine which streets are to be repaired with gas tax funds. Substantial public improvements can only be made through the enactment of city ordinances.
281-62	Aug 24		Opinion letter to Mr. June R. Rose
288-62	Sept 12		Opinion letter to Mr. William A. Geary, Jr.
289-62	July 27	ELECTIONS. SUFFRAGE. VOTER REGISTRATION. PRIMARY ELECTIONS. GENERAL ELECTIONS.	The 29th day prior to any general or primary election day is last day for valid registration for such election; persons registering after 29th day and before election day may not vote in election but are properly registered for next election. County Clerk should withhold registration cards of late registrants until day after election immediately following 28-day period and then place in proper binders.

291-62	July 27		Opinion letter to the Honorable Thomas D. Graham
292-62	Aug 9		Opinion letter to the Honorable J. R. Fritz
297-62	Aug 1		Opinion letter to Dr. George A. Ulett
298-62	Aug 6		Opinion letter to the Honorable William H. Frye
302-62	Oct 5		Opinion letter to the Honorable Stephen E. Strom
306-62	Aug 10		Opinion letter to the Honorable Bernard W. Gorman
309-62	Oct 1		Opinion letter to the Honorable Warren E. Hearnese
312-62	Sept 25		WITHDRAWN
315-62	Nov 2		Opinion letter to the Honorable John A. Honssinger
321-62	Sept 21		Opinion letter to the Honorable William H. Bruce, Jr.
327-62	Oct 5		Opinion letter to Mr. Lawrence A. Schneider
328-62	Sept 13	VILLAGES. CHAIRMAN. VOTE. BOARD OF TRUSTEES.	In filling vacancies on the board the chairman of the Board of Trustees of the Village of Bel-Ridge has no vote unless there is a tie.
329-62	Sept 27	FIRE PROTECTION DISTRICTS. MUNICIPAL CORPORATIONS. TAXATION. MUNICIPALITY.	The board of directors of a fire protection district in a county of the first class has the power to provide for the pensioning of the salaried members of its organized fire department of the district if such authority is approved as provided for in Section 321.220 (15), RSMo Supp. 1961, H.B. No. 12, Section 1, 71st General Assembly, and that by reason of Section 321.240, RSMo 1959, the rate of tax levy for such district's operation costs to include "a pension and retirement plan" "shall not exceed thirty cents on the one hundred dollars valuation."
332-62	Dec 13	INHERITANCE TAX. ESTATES. TRUSTS.	When a testamentary trust is created giving the beneficiary the income for life and the general testamentary power of appointment over the remainder, then the beneficiary is only subject to an inheritance tax valued upon the life estate created. The assessment of tax against the remainder is postponed until the exercise or non-exercise of the power of appointment.
336-62	Sept 19	SHERIFFS. ELECTIONS. NOMINATION TO FILL VACANCY. PARTY COMMITTEES.	1. An election to fill the vacancy in sheriff's office in Randolph County, Missouri, due to death of sheriff on September 4, 1962, must be held at the time of the general election in November, 1962. 2. The person elected as sheriff can qualify and assume his duties immediately after the election. 3. Each party county committee has authority to nominate a person on its party ticket to run for sheriff. 4. The names of the nominees selected by the county party

			committees must be on the regular general election ballot.
337-62	Sept 20		Opinion letter to the Honorable William J. Esely
340-62	Oct 16	COUNTY OFFICERS. COUNTY CLASSIFICATION. SALARIES, FEES AND COMPENSATION.	1. The question of whether Taney County shall become a county of the third class should not be submitted to a vote of the people of Taney County at the general election on November 6, 1962. 2. The effective date of the change in salary for officials of Taney County is the first day of the year of incumbency of such officials which coincides with or is subsequent to date of the change in status of Taney County from a fourth class to a third class county, and the effective date of this change in status is January 1, 1963.
342-62	Dec 27		Opinion letter to H. M. Hardwicke, M.D.
343-62	Sept 26	VOTING MACHINES. BOARD OF ELECTION COMMISSIONERS. ELECTIONS.	Rental charges for additional voting machines for use in St. Louis County are not required to be paid solely out of bond issue funds.
347-62	Oct 19		Opinion letter to the Honorable Lewis B. Hoff
348-62	Dec 10		Opinion letter to J. P. Russell, M.D.
349-62			Opinion letter to the Honorable John Hosmer
352-62	Oct 9		Opinion letter to the Honorable Paul L. Bell
353-62	Sept 25		WITHDRAWN
356-62	Sept 25		Opinion letter to the Honorable E. J. Cantrell
358-62	Dec 27	COUNTY ZONING. COUNTY PLANNING COMMISSION. COUNTIES OF THIRD AND FOURTH CLASS.	The County Zoning Commission has not authority over areas within an incorporated municipality.
360-62	Dec 7		Opinion letter to the Honorable M. E. Morris
365-62	Dec 17		Opinion letter to the Honorable Rufe Scott
367-62	Oct 15	DIVISION OF WELFARE. WELFARE DEPARTMENT. SURPLUS COMMODITIES.	Division of Welfare may reimburse City of St. Louis 50% of expenditures incurred by it in issuance of Food Stamps.
368-62	Oct 16		WITHDRAWN
369-62	Oct 15		Opinion letter to the Honorable John F. Hayner

370-62	Dec 21		Opinion letter to the Honorable Robert P. C. Wilson, III
376-62	Oct 16		Opinion letter to Mr. George E. Schaaf
379-62	Oct 18	NOTICE. PUBLICATION. BOND ISSUE.	Notice for bond issue in Adair County should be published in a newspaper once during the week of October 21 to October 27, 1962, and once during the week of October 28 to November 3, 1962.
381-62	Dec 5		Opinion letter to Mr. Bernard W. Gorman
382-62	Nov 2	CONSTITUTIONAL LAW. COMPENSATION. COUNTY COLLECTORS. COUNTY OFFICERS.	1. A final declaration that a statute is unconstitutional renders the statute void from the date of its enactment. 2. The result of the decision declaring Section 48.030-2 unconstitutional is that all counties which except for the subdivision would have become third class counties on Jan. 1, 1961, shall be deemed to have become third class counties on that date. 3. Any change in the salary or fees of county officials of Christian, McDonald and Wright counties resulting from the transition shall become effective in 1961 on the date corresponding to the beginning of the term of such officials. Excess fees retained since the first Monday in March, 1961, may be recovered from the county collectors of these counties.
384-62	Oct 31	PROBATION AND PAROLE. VOTER, QUALIFICATIONS. JUROR, QUALIFICATIONS. CIVIL RIGHTS, RESTORATION.	Section 216.355, RSMo 1959, provides for the issuance of a certificate evincing the restoration of all the rights of citizenship by the Board of Probation and Parole to persons convicted of a first felony who are finally discharged from parole. Said section does not entitle any person convicted of more than one felony to such a certificate whether the felony for which he was previously convicted was committed within or without the State of Missouri.
389-62	Oct 29		Opinion letter to the Honorable Joe H. Miller
394-62	Oct 30		Opinion letter to the Honorable A. J. Anderson
395-62	Oct 31		Opinion letter to the Honorable Maurice Schechter
396-62	Dec 13	CRIMINAL COSTS. SUSPENDED SENTENCE. PROBATION AND PAROLE. LIMITATIONS OF CLAIMS AGAINST STATE.	(1) Where imposition of sentence is suspended, state is not liable for costs unless and until defendant is thereafter sentenced to penitentiary. (2) Costs for which state is liable after final judgment include costs incident to revocation of probation granted when imposition of sentence is suspended. (3) Liability of state accrues upon final judgment and sentence, even if sentence is imposed more than two years after conviction.
398-62	Dec 20		WITHDRAWN

400-62	Nov 1		Opinion letter to the Honorable Eugene S. Heitman
401-62	Nov 14		Opinion letter to Mr. Francis M. Linek
403-62	Nov 5	GASOLINE TAX. CITIES, TOWNS AND VILLAGES. CITY COLLECTOR.	City collectors are not entitled to a commission for any alleged "collection" of gas tax since the State of Missouri collects the tax and has been compensated for such collection.
407-62	Nov 16		Opinion letter to the Honorable Harold L. Miller
409-62	Nov 19		1. Official war ballots mailed prior to naming of nominee for county office by county political committee valid notwithstanding that no name placed on ballot for such office. 2. §112.030 prescribes written application for absentee ballot but absentee ballot procured by oral application not invalid. 3. §112.080, relating to challenging of absentee ballots, not modified by the adoption of §114.220, the local option county registration law.
412-62	Dec 13		Opinion letter to the Honorable T. D. McNeal
413-62	Dec 14		Opinion letter to Dr. George A. Ulett
416-62	Dec 21		WITHDRAWN
420-62	Nov 21		Opinion letter to the Honorable Charles D. Trigg
422-62	Dec 27		Opinion letter to the Honorable William J. Cason
423-62	Dec 13		WITHDRAWN
424-62	Dec 20	INSURANCE.	Articles of Incorporation of proposed Old Reliable Fire Insurance Company are legally deficient and may not be certified under Section 379.040, RSMo 1959.
427-62	Dec 27		WITHDRAWN
428-62	Dec 13		Opinion letter to the Honorable Garner L. Moody
429-62	Dec 6	COUNTY SUPERINTENDENT OF SCHOOLS. ELECTIONS. SCHOOLS. VACANCY. SALARIES AND FEES.	1. The qualified voters of Pemiscot County should elect a county superintendent of schools at the annual district school meeting to be held on the first Tuesday in April, 1963. 2. The State of Missouri will contribute its share of the salary to which the duly elected and qualified county superintendent of schools of Pemiscot County is entitled to statute.
430-62	Dec 27		Opinion letter to Mr. William J. Theurer
435-62	Dec 20	PUBLIC SCHOOL RETIREMENT SYSTEM.	Public school retirement system contracts with servicers on FHA secure loans and procedures for handling foreclosures on such loans are proper and are approved.

437-62	Dec 19		Opinion letter to the Honorable Maurice Schechter
438-62	Dec 11		Opinion letter to the Honorable Clyde F. Portell
442-62	Dec 18		Opinion letter to the Honorable Paul E. Williams
443-62	Dec 27	COUNTIES. COUNTY HEALTH CENTER. HEALTH CENTER. ELECTIONS. VOTES.	Persons receiving highest number of votes in election for county health center trustees are elected, whether their names appear on ballot or whether they are written in by voters. If elected person refuses to accept office, person with next greatest number of votes is not elected; rather, a vacancy exists which is filled by appointment.
445-62	Dec 17		Opinion letter to the Honorable Thomas A. Walsh

INHERITANCE TAX WAIVERS: The decision of the Missouri Supreme Court in the case of Estate of Osterloh v. Carpenter does not affect the waiver requirements contained in Section 145.210, M.S.R.

January 10, 1962



Mr. M. E. Morris
Director of Revenue
Jefferson Building
Jefferson City, Missouri

Dear Mr. Morris:

This is in reply to your request for an opinion from this office which reads as follows:

"We respectfully request an opinion from your office as to whether or not it is necessary for banks to secure a waiver from the Director of Revenue and the Attorney General before transferring jointly-held bank accounts, or other jointly-held property to the survivor.

"This request is made in view of the recent Supreme Court decision in the Osterloh case . . . "

The requirement of securing a waiver from the Director of Revenue and the Attorney General is contained in Section 145.210, M.S.R., the pertinent parts of which read as follows (subparagraphs 2, 3 and 4):

"2. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who is a resident or nonresident, or belonging to or standing in the joint names of such a decedent and one or more persons, including the shares of capital stock or other interest in a safe deposit company, trust company, corporation, bank or other institution making a

Mr. M. E. Morris

delivery or transfer herein provided, shall deliver or transfer the same to the executor, administrator, or legal representative of said decedent or the survivor or survivors when in the joint name of a decedent and one or more persons or upon their order or request unless notice of the time and place of such intended delivery or transfer be served upon the director of revenue and attorney general at least ten days prior to said delivery or transfer; nor shall any safe deposit company, trust company, corporation, bank or other institution, person or persons, deliver or transfer any securities, deposits, or other assets belonging to or standing in the name of decedent or belonging to or standing in the joint names of decedent and one or more persons, including the shares of capital stock of or any other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, or other assets, including the shares of capital stock or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer under the provisions of this chapter unless the director of revenue and the attorney general consent thereto in writing.

"3. And it shall be lawful for the director of revenue together with the attorney general, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer.

"4. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax or interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or

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persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits, or other assets, including the charges of capital stock of, or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto a penalty of one thousand dollars; and the payment of such tax and interest thereon or the penalty above prescribed or both may be enforced in an action brought by the attorney general at the relation of the director of revenue, in any court of competent jurisdiction."

The recently decided case of Osterloh's Estate v. Carpenter, 337 S. W. 2d 942, held that the creation of a joint tenancy is not a transfer of property within the ambit of our inheritance tax laws relating to transfers in contemplation of death. A prior decision of the Missouri Supreme Court in the case of In re Gerling's Estate, 303 S. W. 2d 915, held there was no transfer of property subject to inheritance tax upon the death of the joint tenant.

Put in its simplest terms, this opinion request hinges on whether the requirements as set forth in Section 145.210 are premised upon the taxability of the transfers noted. If this were true, the above noted Supreme Court decisions holding that neither the creation of a joint tenancy nor the death of the joint tenant are taxable transfers within the purview of our inheritance tax statutes, would effectively abrogate the requirements of this section as to the securing of waivers.

A careful reading of this statute convinces us this is not so. It is to be noted that Section 145.210 specifically includes jointly held property, the type of ownership here under inquiry. It is also to be noted that the statute repeatedly refers to the "delivery or transfer" of the property. It would appear, therefore, that the legislature, in setting forth the waiver requirements, was not concerned exclusively with the taxability of the transaction. If it were, Section 145.210 would have been limited to "transfers" of property, the only type of transaction taxable under our inheritance tax statutes. The legislature, as noted above, included the word "delivery" which may or may not be taxable. The statutes specifically state that a waiver is required before the

Mr. M. E. Morris

"delivery" of jointly held property. Therefore, the Supreme Court decision that there is no transfer cannot affect the requirements as set forth in the statute.

The statutes themselves provide the one exception where the provisions of Section 145.210, RSMo 1959, become inoperative. Subsection 2, Section 145.150, RSMo 1959, reads as follows:

"The court shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the court, that the estate is not subject to the tax provided for in this law, its finding and opinion shall be entered of record in the court and thereupon the provisions of section 145.210 become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement is shown."

It would appear, therefore, that if, after the filing of the inventory and appraisement of the estate of the decedent, it is the opinion of the court that these items are not taxable, then and only then do the provisions of Section 145.210 become inoperative.

It is apparent that the provisions of Section 145.210 are designed to put the state on notice as to the existence of the described property purported to be jointly held, so that a determination might be made as to the correctness of this designation.

CONCLUSION

In conclusion, the decision of the Missouri Supreme Court in the case of Osterloh's Estate v. Carpenter, supra, does not affect the waiver requirements in Section 145.210.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert D. Kingsland.

Very truly yours,

RDK:LC:BJ

THOMAS F. EAGLETON
Attorney General

February 21, 1962



Honorable James P. Landis
Representative, Newton County
605 West Hickory Street
Neosho, Missouri

Dear Mr. Landis:

This is in response to your request for an opinion which reads as follows:

"I respectfully request your opinion as to whether, in view of the changed character of use of Fort Crowder and the fact that it is no longer being operated as an army camp, Fort Crowder residents are now entitled to exercise the right to vote in state and county elections."

The United States accepted this land by cession from this state under the statutory provisions which are now 12.040, RSMo 1959, as a military reservation. Within this statute is a proviso that the jurisdiction ceded to the United States continue no longer than the period during which the land ceded is used for the purpose or purposes for which it is acquired.

If a factual determination can be made on a local level that any part of the area in question is no longer used for military purposes, either temporarily or permanently, then by virtue of the statute cited, exclusive jurisdiction therein is no longer in the United States and the jurisdiction of the state has reverted. In such case persons residing in these areas may acquire the status of electors if otherwise qualified.

Yours very truly,

HLM:BJ

THOMAS F. EAGLETON
Attorney General

JUVENILE OFFICERS:
DEPUTY JUVENILE OFFICERS:
COMPENSATION:

January 5, 1962

1. It is mandatory that the judge of a judicial circuit comprised of third and fourth class counties appoint a juvenile officer or enter into an agreement under which such an officer is appointed for his circuit and one or more other circuits.
2. It is permissible for a deputy juvenile officer to be appointed when no appointment of a juvenile officer for the circuit has been made.
3. A deputy juvenile officer, although appointed for an entire circuit, may be designated to serve one specific county within a judicial circuit at the exclusive discretion, and under the direction and control of the juvenile court for the circuit.
4. The salary and expense of deputy juvenile officers serving third and fourth class counties comprising a judicial circuit must be prorated amongst all of the counties of the circuit according to their population, regardless of how or where such deputies are directed to serve by the court.

Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Mr. Holman:

This is written in answer to your request for opinions of this office dated June 16, 1961, which read as follows:

"1. Is it mandatory that the judge or judges of a judicial circuit or circuits in counties of the third and fourth class appoint a juvenile officer for their circuit or circuits?

"2. Would it be permissible for a deputy juvenile officer to be appointed when no appointment of 'a juvenile officer' for the circuit has been made?

"3. May a deputy juvenile officer, serving under a regular appointed juvenile officer, be so designated to serve one specific county within the judicial circuit?

"4. Shall the salary and expenses of the deputy be paid, in the entirety, solely by the county for which he is designated to serve or shall it be prorated against the counties comprising the judicial circuit?"

To these I reply in the order in which they are presented as follows:

I.

It is mandatory that the judge of a judicial circuit comprised of third and fourth class counties appoint a

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Honorable Haskell Holman

juvenile officer or enter into an agreement under which such an officer is appointed for his circuit and one or more other circuits.

This is supported by an opinion from this office to The Honorable Claude E. Curtis, Judge, Nineteenth Judicial Circuit, dated October 29, 1957, which I find to be correct to this date. There have been no pertinent changes in the law since that opinion was rendered and I enclose a copy thereof herewith for your use.

II.

It is permissible for a deputy juvenile officer to be appointed when no appointment of "a juvenile officer" for the circuit has been made.

Two consistent approaches to this question are necessary because of the use of the word "deputy".

First, the purpose of the law should be examined. This law (211.011, et seq, RSMo 1959) pertaining to juveniles, juvenile courts and juvenile officers throughout places the onus of supervision, control and responsibility of the same squarely on the back of the circuit court.

To implement this task and, in some respects to alleviate the burden, the legislature has devolved upon the court the widest possible latitude. But, in any event, all personnel of the juvenile court are directly responsible to the judge thereof.

Second, it appears that the legislature used the word "deputy" in connection with the two words "juvenile officer" merely as a means of designating other officers which the court could, when deemed necessary, appoint, to serve as juvenile officers but, by Section 211.391.1.(3), at a lower maximum compensation.

Legal interpretation of the meaning of the word "deputy", elsewhere and in Missouri, seems to be well settled.

"Merely calling one a deputy is not alone sufficient unless the duties of a 'deputy' apply to his office and are specified by some act of the legislature, . . . Steen v. Nassau County, 38 NYS 2d 496."

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"It is a well settled rule of law that all official acts done by a deputy should be done in the name of the principal. 'A deputy is one who by appointment exercises an office in another's right having no interest therein but doing all things in his principal's name and for whose conduct the principal is answerable'." Halter et al v. Leonard et al, 122 S.W. 706, 1.c. 708.

Clearly a "deputy juvenile officer" is not appointed by a "juvenile officer", nor does he act in the right of a "juvenile officer", nor does he do all things in the name of a "juvenile officer", neither is a "juvenile officer" answerable for the misconduct of a "deputy juvenile officer".

All of these a "deputy juvenile officer" does by Section 211.351(1), RSMo 1959, under direction of the juvenile court by whom he is appointed, in whose right he acts, in whose name he acts and to whom he answers for his own misconduct. The juvenile court, of course, answers to its own conscience and, ultimately, to the people.

A "deputy juvenile officer" is not a deputy to a "juvenile officer" but is a deputy to the court in matters pertaining to juveniles. This, however, must not be construed to mean that the juvenile court cannot direct that a "deputy juvenile officer" serve in a capacity subordinate to a "juvenile officer".

III.

A deputy juvenile officer, although appointed for an entire circuit, may be designated to serve one specific county within the judicial circuit at the exclusive discretion, and under the direction and control, of the juvenile court for the circuit.

As was sufficiently demonstrated under II above, the assignment of all personnel under the aegis of the juvenile court is purely a matter of judicial discretion. The court may direct that a "deputy juvenile officer" serve in any particular manner or place as the needs of the court require.

IV.

The salary and expense of deputy juvenile officers serving third and fourth class counties comprising a judicial

Honorable Haskell Holman

circuit must be prorated amongst all of the counties of the circuit according to their population.

This is so because of the provisions of Section 211.351.2, RSMo 1959:

" . . . the total cost to the counties [third and fourth class counties comprising a judicial circuit] for the compensation of these persons [a juvenile officer and other juvenile court personnel] shall be prorated among the several counties and upon a ratio to be determined by a comparison of the respective populations of the counties."

A fortiori, Section 211.391.4, RSMo 1959, provides:

"The salaries and expenses of juvenile officers and other juvenile court personnel serving two or more counties of the third and fourth classes which comprise one or more judicial circuits are payable out of county funds and prorated among the several counties served upon a ratio determined by a comparison of the respective populations of the county."

CONCLUSION

Entertaining these views, it is my opinion that:

1. It is mandatory that the judge of a judicial circuit comprised of third and fourth class counties appoint a juvenile officer or enter into an agreement under which such an officer is appointed for his circuit and one or more other circuits.
2. It is permissible for a deputy juvenile officer to be appointed when no appointment of a juvenile officer for the circuit has been made.
3. A deputy juvenile officer, although appointed for an entire circuit, may be designated to serve one specific county within a judicial circuit at the exclusive discretion, and under the direction and control of the juvenile court for the circuit.

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4. The salary and expense of deputy juvenile officers serving third and fourth class counties comprising a judicial circuit must be prorated amongst all of the counties of the circuit according to their population, regardless of how or where such deputies are directed to serve by the court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Howard L. McFadden.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

HLM:BJ

INCOME TAX:

In the interpretation of the meaning of "gross income" as used in Section 143.170, the term should be limited to "income" as defined in Section 143.100.

June 6, 1962

OPINION NO. 7 (1962)
267 (1961)

Honorable M. E. Morris
Director, Department of Revenue
Jefferson Building
Jefferson City, Missouri



Dear Mr. Morris:

This is in reply to your letter requesting an official opinion from this office. Your letter reads as follows:

"We should like to have your official interpretation of Sections 143.100 and 143.170 RSMo 59.

"Section 143.170 in part specifies that 'No person can be claimed as a dependent who has a gross income of four hundred dollars or more during the taxable year for which the return is filed . . .'

"In interpreting the meaning of 'gross income' should any income other than that defined in Section 143.100 be considered in determining a dependency credit?"

Section 143.100 referred to in your opinion request reads as follows:

"Income defined---net income.---1.
Income shall include gains, profits, and earnings derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid; and from professions,

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vocations, businesses, trade, commerce, or sales or dealings in property whether real or personal, growing out of the ownership or the use of any interest in real or personal property. In any case of sale of capital assets, consisting of real or personal property which has been held for less than six months one hundred per cent of the gain or loss shall be taken into consideration in computing net income; where real or personal property has been held for more than six months only fifty per cent of the gain or loss resulting from sale or exchange shall be taken into account in computing net income, but in such cases any loss used in computing the net income shall not exceed two thousand five hundred dollars over and above gain for the same period. The term 'capital assets', as used in this subsection means property held by the taxpayer (whether or not connected with his trade or business), but does not include:

(1) Stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2) Personal property used in his trade or business, of a character which is subject to the regular allowance for depreciation;

(3) A copyright, a literary, musical or artistic composition or similar property, held by a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in

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the hands of the person whose personal efforts created such property;

(4) Gain or loss on the sale of property as defined in the foregoing descriptions, subdivision (1) to (4), shall be classified as ordinary gain or loss transactions taxable one hundred per cent;

(5) In the case (a) of a casual sale or other casual disposition of personal property (other than property of a kind which would be properly included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding one thousand dollars, or (b) of a sale or other disposition of real property, if in either case the initial payments do not exceed thirty per cent of the selling price, the tax on the net profit on such transaction, computed as aforesaid, shall be imposed only on that portion of such net profit which the amount actually received in payment of the purchase price bears to the total purchase price. As used in this section, the term 'initial payments' means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

"2. Income shall also include interest, rent, dividends, securities and gains, profits and earnings from any other transactions of any business carried on for gain or profit; and from any sources whatever; income shall also include the share of each person in the undistributed profits and earnings of partnerships, and the share of each stockholder in the undistributed profits and earnings of corporations, joint stock companies, or joint stock associations whose income is not exempted and against whose income there is no provision for a tax.

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"3. Amounts received as an annuity under an annuity contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to three per cent of the aggregate premiums or considerations paid for such annuity, whether or not paid during such year, until the aggregate amount excluded from gross income equals the aggregate premiums or considerations paid for such annuity.

"4. Income shall also include all periodic payments, whether or not made at regular intervals, received by a wife who is divorced or legally separated from her husband under a decree of divorce or separate maintenance, but shall not include that portion of such periodic payments which are fixed by the decree or written instrument for the support of minor children of such husband. If any periodic payment is less than the amount specified in the decree or written instrument for the support of minor children, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Such payments as are imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation for alimony shall be deductible from the adjusted gross income as determined in accordance with this section. No part of any court decree which represents payment for child support is deductible on the income tax return.

"5. Interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise, to the extent deductible by such residents, interest on any obligation secured by lien on any property having a situs in this state, to the extent deductible by the lienor, and wages, salaries and compensation paid

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to a nonresident for services rendered in this state, and undistributed profits and earnings of partnership accruing on account of business and transaction in this state, and dividends on capital stock, and undistributed profits and earnings of corporations, joint stock companies or joint stock associations whose income is not exempted and against whose income there is no provision for a tax, accruing on account of business transactions in this state, and gains, profits and earnings from any use or sale of real or personal property in this state, or any interest therein shall be considered as from sources within this state.

"6. Dividends on the stock of any subsidiary corporation incorporated under the laws of this state shall not be regarded as taxable income to the parent corporation where such parent corporation makes a consolidated return for income tax purposes to the United States and includes the income of such subsidiary therein. Dividends on corporate stock owned by another corporation shall not be income of the corporation receiving such dividends where the corporation declaring the dividend has paid its tax to this state on the portion of its income subject to tax by this state.

"7. Net income shall be determined by deducting from income the deductions now or hereafter provided by law."

Section 143.160 provides "In ascertaining net income there may be deducted from gross income derived during the same period the following: * * *". (Emphasis supplied). The statute then proceeds to set out allowable deductions to the taxpayer.

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Section 143.170 generally sets out the standard deductions for dependents and states " * * * No person can be claimed as a dependent who has a gross income of four hundred dollars or more during the taxable year for which the return is filed * * * ". The statute then proceeds to define who may qualify as dependents.

The question presented by you hinges solely on the meaning of "gross income" as referred to in Section 143.170. Is this term limited by the definition of "income" referred to in Section 143.100 or is some other standard applied?

There is a general rule of statutory construction for revenue laws that they are construed in favor of the taxpayer and against the taxing authority. In re Kansas City Star Company, 142 SW2d 1029, 346 Mo. 658; State ex rel. Ford Motor Company vs. Gahner, 24 SW2d 13, 325 Mo. 24. The fact that a particular subject of taxation is within the purview and intendment of the taxing statute must clearly appear. Artophone Corp. vs. Coale, 133 SW2d 342, 347, 345 Mo. 344.

Another applicable rule of statutory construction is that the definition of a term in a statute must be given great weight in construing the statute. In the case of Producers Produce Company vs. Industrial Commission, 281 SW2d 619, the Springfield Court of Appeals noted, 1. c. 629 [6-9]:

"We think the trial court disregarded the rule of construction that the statute as a whole should be considered in determining the intention of the Legislature in its passage. The lawmaking body's own construction of its language by means of definition of the terms employed, should be followed in the interpretation of the Act or section to which it relates and is intended to apply. Indeed a statutory definition supersedes the commonly accepted, dictionary or judicial definition. Where the Act passed by the Legislature embodies a definition it is binding on the courts."

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The Court in the above decision cited with approval the case of Lennox Realty Company vs. Hackett, 187 Atl. 895, 898, which held:

"* * * even if the mortgages here involved could be considered, practically or theoretically, as a part of the capital of the plaintiff corporation as the tax commissioner contends, they are not within the scope of any of the elements specified by the statute, and if it might be assumed that the General Assembly would have so enlarged the definition as to include them had it contemplated such a situation as is here presented, and it is not our province to supply the omission by inferior judicial construction." (Emphasis supplied).

To construe "income" as other than that as defined in Chapter 143, RSMo 1959, would make effective administration impossible. There is no other workable standard available other than that spelled out in this statutory definition.

CONCLUSION

In interpreting the meaning of "gross income" as used in Section 143.170, the term should be limited to "income" as defined in Section 143.100.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert D. Kingsland.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

RDK:mw:jh

VOTERS:
REGISTRATION OF VOTERS:

A registered voter in Class II, III and IV counties whose name is changed must reregister in order to vote. Such person may reregister at any time. County Clerk shall not cancel or reinstate any registration within five days prior to election except by order of Circuit Court.

Opinion No. 10 (62) No. 282 (61)
Mansur

April 11, 1962

Honorable Harold L. Volkmer
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Mr. Volkmer:

In your letter of August 4, 1961, you requested an opinion from this office in the following language:

"1. Must a person, who is registered to vote under Chapter 116, R.S.Mo., and who thereafter because of marriage or other reasons lawfully changes his or her surname, re-register under his or her new surname in order to be entitled to vote at any subsequent election in which the registration books are used.

"2. May a person who is registered under Chapter 116, R.S.Mo., and thereafter lawfully changes his or her surname during the closed period for registration, under Section 116.030, R.S.Mo., vote at the election for which the books were closed, using his or her former surname or new surname.

"3. By what process and at what time may the official in charge of the registration books remove registration cards from the registration books."

Chapter 116, RSMo 1959, governs the registration of voters in cities of 10,000 or more population in class two, three and four counties, and the answer to the questions you submit will be governed by this chapter.

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Section 116.010, RSMo 1959, provides there shall be a registration of qualified voters under the provisions of Chapter 116 in every city containing at least 10,000 inhabitants located in a county not having county-wide registration. It further provides:

"After so registering, a qualified voter shall not be required to register again unless obliged to do so by the terms of this chapter. The registration of any voter may be changed, canceled or transferred only as provided in this chapter."

Section 116.020, RSMo 1959, provides:

"Every citizen of the United States who is over the age of twenty-one years, who has resided in this state one year next preceding the election at which he will be entitled to vote, and during the last sixty days of the time shall have resided in the city, and during the last ten days of that time in the precinct of the ward at which he will be entitled to vote, who has not been convicted of a felony or of a misdemeanor connected with the exercise of the right of suffrage, who is not an idiot or an insane person and who is not kept in any poorhouse or confined in any public prison shall be entitled to register and vote in the election precinct where his name is registered, and whereof he is registered as a resident." (Emphasis supplied.)

Section 116.030, RSMo 1959, provides in part:

"Any qualified elector who registers as herein provided shall be entitled to vote in the election precinct where his or her name is registered and in which he or she is registered as a resident. * * *" (Emphasis supplied.)

Said Section 116.030 also provides for the county clerk to supervise the registration of voters and further provides:

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"No person shall be entitled to register within a period of twenty-eight days prior to any election in which the registration records provided for in this chapter are used. The county clerk shall not cancel or reinstate any registration within five days prior to any such election, except at the direction or order of the circuit court. * * *"

Section 116.070, RSMo 1959, provides in part:

"Any person who, after registration, lawfully changes his or her surname, shall be entitled to reregister under the changed name, and the county clerk shall cancel the previous registration. Any registered voter who changes his address within the city may, at any time prior to the close of registration for any election, transfer his registration by sending to the county clerk a signed application for transfer or by appearing in person at the office of the county clerk and making application for transfer. * * *"

Section 116.070 further provides:

"Any duly registered voter who has complied with the provisions of this chapter and who shall change his address within the city during the closed period for registration may for the purpose of the election immediately following such closed period vote in the precinct in which he is properly registered, even though he may have moved from that address during the closed period, if in all other respects he is a properly qualified voter of such city."

Article VIII, Section 2, Constitution of Missouri, 1945, provides in part:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, are entitled to vote at all elections by the people. * * *"

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Article VIII, Section 5, Constitution of Missouri, 1945, provides:

"Registration of voters may be provided for by law."

The general rules governing the construction of registration laws is stated in 29 C.J.S., Elections, Sec. 37, Page 60, as follows:

"The primary purpose of registration laws is to prevent the perpetration of fraud at elections by providing in advance thereof an authentic list of the qualified electors; and every part of a registration act must be so construed as to effectuate this purpose, and to give electors the fullest opportunity to vote that is consistent with reasonable precautions against fraud. Likewise, all provisions of such laws should, if possible, be construed so as to avoid conflict."

In 29 C.J.S., Elections, Sec. 13, page 33, it is stated:

"In some jurisdictions the constitution makes provision for the registration of voters, and legislation must be consistent with the constitutional regulations."

* * * * *

"Registration laws, as such, usually are not regarded as adding a new qualification to those prescribed by the constitution, or as abridging the constitutional right of suffrage, but rather as reasonable and convenient regulations of the mode of exercising the right of suffrage, although, as is observed in subdivision b(2) of this section, a registration law is void which attempts to prescribe qualifications additional to those fixed by the constitution."

* * *"

In *State ex rel Meyer vs. Woodbury*, Supreme Court, 10 S. W. 2d 524, the court held that a statute requiring a voter to be registered before being eligible to vote was not a conflict with the constitutional provision defining voters' qualifications, and that such statute did not impose an unreasonable requirement upon the voter.

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In State ex rel Hay vs. Flynn, St. Louis Court of Appeals, 147 S. W. 2d 210, the voter appeared before the election board less than fifteen days before the election and wanted to register. There was no contention that the voter was not a qualified elector in all respects if she had presented herself for registration in due time. The court held that she was not entitled to register to vote for the particular election. The court stated, 1. c. 211:

"Relator's position is that the provisions of Section 15 supra, which require that registration shall be closed fifteen days preceding a general election, and forty days prior to a municipal election, are mandatory, while respondent contends the provisions are merely directory. There is no absolute test by which the question here presented may be resolved, but in passing upon the matter, the prime object is to ascertain the legislative intent from a consideration of the statute as a whole, bearing in mind its object and the consequences that would result from construing it one way or the other. State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S. W. 2d 104. The primary purpose of registration laws is to prevent fraudulent abuse of the franchise, by providing in advance of elections an authentic list of the qualified voters."

In 65 C.J.S., Names, Sec. 3, page 4, it is stated:

"At marriage the wife takes the husband's surname which becomes her legal name. Her maiden surname is absolutely lost, and she ceases to be known thereby."

These general principles must be applied in construing the statutory provisions involved herein, and all the statutory provisions must be harmonized, if possible.

In considering the first question submitted, Section 116.070, supra, provides that any person who lawfully changes his or her surname after registration shall be entitled to register under the changed name. This statute is not mandatory but merely states that such person shall be entitled to re-register.

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Section 116.030, supra, provides that any qualified elector who registers as provided herein shall be entitled to vote in the precinct where his or her name is registered. We believe that a person must be registered in his or her lawful name before being entitled to vote. As heretofore stated, the primary purpose of the registration of voters is to prevent the attempt of fraudulent use of the voting franchise by determining in advance those persons qualified to vote. The identification of voters is by name.

Section 116.130, RSMo 1959, requires the voter to identify himself and sign his name before receiving a ballot. It further provides the judges of the election shall permit no person to vote unless properly identified as a resident of the precinct and registered as such. Said section further provides: "Whereupon the name of the person being found in the registration records of the precinct in which he offers to vote, the vote of such person shall be received and counted as other votes." (Emphasis supplied)

Under Section 116.050, RSMo 1959, dealing with the duties of the county clerk in administering this law, the county clerk is authorized to use any practical method, such as the checking of mailing lists or other available records, which may assist him in checking, verifying, and keeping up to date the records of registration. This procedure would be ineffective if the elector was not required to be registered under his correct name. Since a woman when she marries loses her maiden name and acquires the surname of her husband as her lawful name, such person would not be registered under her lawful name if she did not reregister after her marriage.

It is our opinion that a woman who is registered as a voter in her maiden name and thereafter marries has to reregister under her married name before she is entitled to vote at subsequent elections where registration is required.

In your second question you want to know whether a person who changes his or her name during the closed period for registration is entitled to vote using his or her former surname or new surname.

There are a number of court decisions in this state construing voter registration laws. They all deal with failure to register or to transfer registration in compliance with the statutes. They all involve situations where the voter could comply with the registration laws

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but merely failed to do so. Such decisions are of very little value in determining the question submitted herein.

Article VIII, Section 2, of the Constitution determines the qualifications of voters. Although Article VIII, Section 5, provides that laws may be enacted providing for registration of voters, such laws cannot conflict with the other constitutional provision regarding the qualifications of voters.

Under the facts submitted herein, where the voter's name is changed during the closed period for registration, there is no statutory provision providing for a remedy for such change of conditions. Such person cannot be charged with neglect or failure to act to change or correct his registration in order for the person to comply with the registration laws. Certainly there is a considerable difference in a situation where the voter has a remedy under the statute and fails to comply with it and a situation where the voter has no statutory remedy.

The voter registration laws must be harmonized if possible and cannot be in conflict with constitutional provisions regarding the qualification of voters (29 C.J.S., Elections, page 60, supra).

A voter cannot be denied the right to vote because he is not correctly registered when there is no statutory procedure for him to be correctly registered. To deny him the right to vote under such conditions would be in violation of his constitutional right to vote. Likewise, we do not believe the Legislature intended for the registration laws to deny such person the right to vote.

Section 116.070, supra, provides that any person who after registration lawfully changes his or her surname shall be entitled to reregister under the changed name. This gives the person the absolute right to be reregistered under the changed name and to have the previous registration canceled by the county clerk. The statute by using the word "reregister" we believe distinguishes the registration from an initial registration. Section 116.030, supra, provides that no person shall be entitled to register within twenty-eight days prior to an election in which the registration records are to be used. We believe this applies only to a voter who has not been previously registered and does not prohibit a registered voter from reregistering under the changed name. It is our opinion that a registered voter who changes his or her surname has the right to reregister under his or her changed name at any time.

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In your third question you inquire by what process and at what time may the person in charge of registration books remove registration cards.

Section 116.030, RSMo 1959, provides in part that the county clerk shall not cancel or reinstate any registration within five days prior to any such election except at the direction or order of the circuit court.

Section 116.110, RSMo 1959, provides in part that:

"Cancellation of registration shall be made by the county clerk whenever it is brought to his attention that a registered voter be dead, disfranchised or removed from the city, in which case the county clerk shall stamp the word 'canceled' across the face of all three signatures of the registered voter, and he shall note thereunder the reason for cancellation; * * *".

Said section further provides that before any voter's name is canceled for any reason other than a change of name or transfer of residence the county clerk shall send a notice of cancellation to the last known address of such voter and also notify the chairman of the two major political parties and a notation thereof shall be made on the master registration.

Section 116.090, RSMo 1959, provides for the registration lists to be checked each four years by the county clerk and the names of the persons found to be improperly registered or disqualified shall be published in a newspaper, and if the voter does not appear at the office of the county clerk within thirty days of such publication his name shall be stricken from the list.

Under Section 116.010, RSMo 1959, the registration of any voter may be changed, canceled or transferred only as provided by statute.

Under these statutory provisions cancellation of a voter's registration cannot be made within five days prior to an election unless by a circuit court order and cancellation must be made as provided in Section 116.110 by stamping the word "canceled" across the face of all three signatures of the voter after he is properly notified.

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CONCLUSION

It is our opinion that:

1. A voter duly registered as a voter in a city of ten thousand or more in a county of class two, three or four, and who thereafter changes his or her name must reregister in order to vote at subsequent elections where voter registration is required.

2. A voter duly registered as a voter who changes his or her surname during the closed period for registration must reregister before he or she is entitled to vote and such person may reregister at any time.

3. The county clerk shall not cancel or reinstate any registration within five days prior to an election except by order of a circuit court. Cancellation of registration is to be made by writing or stamping the word "canceled" over the signatures of the voter on each of the three signature cards.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

MM:BJ

LIBRARY:
CITY LIBRARY:
COUNTY LIBRARY DISTRICTS:

County Library Districts and City Libraries established under Chapter 182 RS 1959 are required to prepare annual budgets under the provisions of Chapter 67 Cum. Supp. 1961.

(Opn. No. 307 - 61)

No. 11 - 62

April 18, 1962



Mr. Paxton P. Price
State Librarian
Missouri State Library
State Office Building
Jefferson City, Missouri

Dear Mr. Price:

This office is in receipt of your request for a legal opinion, which reads as follows:

"Will the provisions of Senate Committee Substitute for Senate Bill No. 171, 71st General Assembly, apply to public libraries established and operated under the library laws of Missouri, when the bill goes into legal effect?"

Further inquiry indicates that your request relates to those public libraries which may be established under the provisions of Chapter 182, RSMo 1959. As we understand it, the question is - does Committee Substitute for Senate Bill No. 171, 71st General Assembly (67.010 to 67.100, Supp. RSMo 1961), apply to public libraries established under Chapter 182, RSMo 1959, so as to require such libraries to prepare annual budgets.

Section 67.010, RSMo 1961 Cum. Supp. provides, in part, as follows:

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"Each political subdivision of this state, as defined in section 70.120, RSMo, except those required to prepare an annual budget by chapter 50, RSMo, and sections 167.130, 167.160, 167.200, and 167.240, RSMo, shall prepare an annual budget. * * *

The exceptions above mentioned in this statute are immaterial to your inquiry.

Section 70.120, RSMo 1959, defines "political subdivision" as follows:

"(2) 'Political subdivision' shall mean any agency or unit of this state which now is, or hereafter shall be, authorized to levy taxes or empowered to cause taxes to be levied."

Chapter 182, RSMo 1959, deals with several types of libraries. We will deal first with county libraries which are covered by Sections 182.010 to 182.120, RSMo 1959.

Section 24, Article VI of the Constitution provides that as prescribed by law, counties, cities and other legal subdivisions of the state shall have an annual budget and file annual reports of their financial transactions. This constitutional provision is expressive of the policy of Missouri. Chapter 67 accords with this policy.

Our Constitution and statutes contain a number of different definitions of "political subdivisions". There is no reason why the legislature may not define "political subdivisions" differently for some purposes than for others except only where a specific constitutional definition is applicable. The legislative purpose in defining "political subdivision" is primarily to assure that a particular agency, unit or instrumentality will be governed by the particular statute in question. Hence, whatever may be the classical concept of "political subdivision", it is irrelevant in ascertaining the legislative intent in enacting a statute related to political subdivisions as defined in such statute.

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The obvious purpose of Senate Committee Substitute for Senate Bill 171, 71st General Assembly (Chapter 67, RSMo, 1961 Cum. Supp.) is to require every agency or unit of the state except those specifically excepted to prepare budgets, provided only that such agency or unit is either authorized to levy taxes or empowered to cause taxes to be levied. This legislative intent is manifested by incorporating into Chapter 67 the definition of "political subdivision" contained in Section 70.120, RSMo. Such definition is extremely broad and comprehensive. Moreover, by simply incorporating the definition of the term as contained in Section 70.120 the Legislature evidenced an intent to exclude the balance of the provisions of Chapter 70 insofar as they relate to rural resettlement or rehabilitation agreements from consideration in ascertaining the meaning to be ascribed to the term "political subdivision".

It follows, therefore, that the question to be determined is whether a county library district established under Chapter 182 is an "agency or unit of this state which now is * * * authorized to levy taxes or empowered to cause taxes to be levied."

Section 182.010, RSMo 1959, provides for the creation of a county library district, a unit distinct and separate from the county. Excluded from such districts are those municipalities which have established their own municipal libraries. The district is created by the majority vote of the voters of the district rather than the voters of the county. So too, the tax rate is voted on and must be approved by the voters of such district.

A brief review of the applicable statutes makes it clear to us that a county library district is a political subdivision within the meaning of the term as used in Chapter 67. Section 182.010, RSMo 1959, specifically provides for the creation of a library district. Prior to its amendment in 1955 this section specifically provided that the county library district "shall be a body corporate and known as such". Although this language is not in the amended section, there is no change in the law, inasmuch as Section 182.070 as amended by the laws of 1955 specifically provides that the district is a body corporate.

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Hence, there can be no question but that the county library district is a public corporation separate and apart from the county itself. It is an agency or unit of the state for the purpose of providing the educational benefits to be derived from a free public library.

Section 182.010, RSMo 1959, provides that the voters in the county library district may vote for a mill tax for a county library and for an increase in such tax. Section 182.020 provides that if a majority of the votes cast in the district is in favor of the proposed tax, then the tax specified shall be levied and collected from year to year. The tax so authorized by the voters of the district may be reconsidered at an election of said district held at least five years after the district has been established. Section 182.100 provides means whereby the district may vote upon the question of whether or not a library building should be erected and a tax levied therefor. Section 182.105 which authorizes the voters of a district to pass upon the question of issuing bonds for the purchasing of grounds and erection of public library buildings specifically provides that before incurring any such indebtedness the county library board shall provide for a tax sufficient to pay the interest and principal of such indebtedness. The foregoing provisions clearly authorize the voters of the district to cause taxes to be levied for the various purposes and functions of operating the library district. In some circumstances the submission of such issue to the voters is caused by the action of the library board, which is expressly declared to be in exclusive control of the property and affairs of the district. Inasmuch as it is required by the statute that the voters of the district as such must approve the levy of the tax, this can only mean that the district itself causes such taxes to be levied. It is true that the district has no authority to levy taxes for library purposes, inasmuch as only the county court can do so. However, in determining whether the "district" is empowered to cause taxes to be levied, there is no reasonable basis for attempting to distinguish between the "district" as such and the voters of the district. Obviously, a "district" can act only through people, and the voters of the district are in truth and in fact such district for the purpose of determining whether the district is "empowered to cause taxes to be levied".

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In State ex rel Benson v. Union Electric Co., Mo. Sup., 220 SW2d 1, 4, the Supreme Court en banc referred to "the fact of the district's lawfully voting the tax."

In our opinion, therefore, a county library district established under the provisions of Chapter 182, RSMo 1959, is a "political subdivision" within the meaning of that term as used in Chapter 67 RSMo, 1961 Cum. Supp., and therefore is required to comply with said chapter respecting the preparation and submission of budgets.

We next consider whether city libraries under Section 182.140 to 182.301 are political subdivisions as that term is defined in Section 70.120 and by reason thereof required to prepare budgets by Chapter 67, RSMo 1961 Cum. Supp.

Section 182.140, RSMo 1961 Cum. Supp. applicable to cities containing more than five thousand and less than six hundred thousand inhabitants provides in paragraph 1 that a free public library established under said section "shall be a body corporate, and known as such". The proceeds of the tax levied for library purposes by the voters as well as other moneys of the library are required by the statute to be kept in the city treasury separate and apart from other moneys of the city, and disbursed by the proper city officer only upon properly authenticated warrants of the city library board of trustees. Paragraph 2. To the same effect is paragraph 4, Section 182.200 RSMo 1959. That section also provides that the library board of trustees "shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund, and of the construction of any library building, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased, or set apart for that purpose". Paragraph 5 of said section grants additional powers to the board "as a body corporate".

The legislative intent is clearly manifested to treat city free public libraries as public corporations separate and independent of the cities in which they have been established. The cities are without any power whatever to exercise control over the funds of the library, all such control being committed to the library boards. While it is true that Section 182.140, prior to its amendment in 1955, did not in terms refer to the

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library as a "body corporate" as does the more recent statute, it is our view that when all of the statutes are read as a whole the legislative intent is manifested to create a body corporate with respect to the library.

That the legislature deemed city libraries to be units comparable to county library districts is evidenced by the references in Section 182.030 to an "existing municipal library district". Inasmuch as no statute of which we are aware ever previously referred to the city library as a municipal library "district", it is evident that the legislature undoubtedly believed that such city libraries were in fact library districts. The mere fact that the establishment of such city libraries and the approval of a tax therefor is to be submitted to the voters of the city does not militate against our view. County library districts do not necessarily comprehend an entire county, so that the statute could not very well require a vote of all the voters of the county. Hence, the matter would be submitted to the vote of those who resided within the territorial limits of the district as such. On the other hand, with respect to city libraries they are for the use and benefit of the entire city, no part thereof being excluded from the territorial limit of the area served by the library. Hence, the voters of the city are, in truth and in fact, the voters of the city library corporation or "district". There is no magic in the use of the word "district" as applied to libraries. A "district" is simply a defined portion of a state, county, or municipality for administrative, electoral or other purposes. The term is descriptive of the territory within which specific authority is exercised for certain statutory purposes. When the voters of the city authorize the library and approve the tax they do so in their capacity as voters of the city library "district".

In State ex rel Carpenter v. City of St. Louis, Mo. Sup., 2 SW2d 713, it was held that a public library is an educational institution over which the state may exercise local control, and that it is not a matter of purely municipal concern. By the Library Act, the legislature was held to assume authority to promote education in localities throughout the state by means other than through the instrumentality of schools. In our view, therefore, a city library established pursuant to the provisions of Chapter 182 is at the very least an agency of the state for educational purposes. It was said in the Carpenter

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case, "Education is not limited to schools and it is within the control of the General Assembly, in the exercise of the State's police powers to provide for other educational agencies * * *."

As a state policy, the General Assembly has assumed control of public free libraries as educational institutions. That is a legislative determination that they are a matter of state concern. As we have pointed out, the library functions through an independent board as a body corporate, which has exclusive control over the expenditure of all moneys constituting the library fund. The Board is not accountable to the city authorities, who must make all payments out of the fund upon proper warrants of the board. In our view, therefore, such city libraries are agencies of the state and are "empowered to cause taxes to be levied". The municipal authorities as such have no power to levy the taxes until they are authorized to do so by the proper vote of those upon whom the burden of the tax levy would fall - the voters within the territorial limits served by the library. These libraries, therefore, come within the clear intent of the definition contained in Section 70.120 RSMo 1959, as agencies of the state "empowered to cause taxes to be levied", and therefore are political subdivisions subject to the provisions of Chapter 67.

As we have stated above, the legislative intent manifested in Chapter 67 is to broaden as far as possible the requirements that all agencies or units of the state prepare budgets. If the statute be construed to apply to county library districts but not to city libraries, the result in our view would be absurd and contrary to the legislative purpose. There is no essential difference in the powers, duties and functions of county library districts and city libraries. The board of each such library has exclusive control over the expenditure of library funds. We can conceive of no possible legislative purpose which would be served by requiring that only county library districts prepare budgets and that city libraries be under no obligation to do so. Inasmuch as the city authorities have no power over the library fund, the result would be that neither the city nor the city library board would be required to prepare a budget for the library, whereas under identical circumstances the county

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library board would be compelled to do so. In our opinion, Chapter 67 is equally applicable to both county and city libraries which are governed by Sections 182.010 to 182.301. It follows that such city libraries are political subdivisions within the meaning of Section 70.120 and required to prepare budgets as required by Chapter 67, RSMo, 1961 Cum. Supp.

In arriving at our conclusion, we have not overlooked the statement of our Supreme Court en banc in State ex rel Board of Directors of St. Louis Public Library v. Dwyer, 234 SW2d 604, 606:

"Of course, the Library is not a political subdivision of the State under the definition of Sec. 15, art. X of the Constitution (or any other definition); but we do not think that determines the matter as the City contends."

What was said in that case must necessarily be read in the light of the question for decision. As was said in State ex rel Bixby v. City of St. Louis, 241 Mo. 231, 145 SW 801, 803:

"The language used by a judge in his opinion is to be interpreted in the light of the facts and issues held in judgment in the concrete case precisely as in every human document . . . It would be a wide and very mischievous departure from correct canons of interpretation to disconnect general language from the issues and facts of a given case and to apply that general language mechanically or automatically to the different facts and different issues of another case; for the sense must be limited according as the subject requires, the words take color from their context."

The Dwyer case involved the right of the library to a share in the intangible taxes returned by the Director of Revenue to the City of St. Louis. The question for determination in that case was stated by the Court as follows:

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"The question involved is whether Sections 4 and 15, art. X, 1945 Constitution, Mo. R.S.A., prevents these amounts from going to the Library Fund."

Hence, when the Court was considering whether the library was a political subdivision, its parenthetical reference to "any other definition" meant only any definition which might be applicable to the question for determination in that case. Obviously, the Court did not search through the statute books to ascertain whether any of the many definitions of political subdivision might apply to city libraries, because no such question was before the Court. It is equally obvious that the Court did not have before it any question comparable to that here involved, namely whether the 1961 legislative intent manifest in Chapter 67 was to include city libraries as among those agencies or units of the state which should be required to prepare budgets.

CONCLUSION

It is the opinion of this office that both county library districts and city libraries established under Chapter 182, RSMo 1959, are required to prepare annual budgets under the provisions of Chapter 67, Cum. Supp. 1961 (Senate Committee Substitute for Senate Bill 171, 71st General Assembly).

This opinion, which I hereby approve, was prepared by my assistants, Mr. Gordon Siddens and Mr. Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

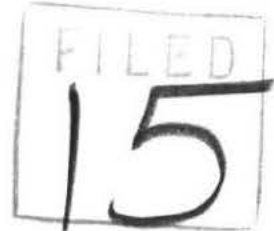
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CIGARETTE TAX:

Cigarette tax paid by wholesaler on cigarettes sold by him and later returned may be refunded to wholesaler in certain circumstances.

Opn. No. 335(1961)
No. 15(1962)

February 16, 1962



Mr. R. B. Browning, Supervisor
Cigarette Tax Division
Department of Revenue
Jefferson City, Missouri

Dear Mr. Browning:

This refers to your letter requesting an opinion concerning cigarette tax refunds, which letter reads as follows:

"I should like to request an opinion from your department as to the effect the insertion of paragraph 4 of Section 149.020 will have on the previous ruling from your office relative to refunds."

The prior opinion of this office to which you refer is one addressed to you under date of November 17, 1958, in which we concluded as follows:

"It is the opinion of this office that no refund of the State cigarette tax may be made to a wholesaler with respect to cigarettes which have been sold by the wholesaler within the State of Missouri and which are subsequently returned to him."

The statutory provision for the refund of cigarette taxes, which has not been amended since the date of our prior opinion, now appears in Section 149.040, RSMo 1959, which reads as follows:

"Whenever any cigarettes upon which stamps have been placed have been sold or shipped into another state for sale or use there or have become

unfit for use and consumption or unsalable, or have been destroyed, the wholesaler shall be entitled to a refund of the actual amount of the tax paid with respect to such cigarettes. If the division is satisfied that any wholesaler is entitled to a refund it shall issue to the wholesaler stamps of sufficient value to cover the refund. The division may redeem unused stamps lawfully in the possession of any person; and may prescribe necessary rules and regulations concerning refunds and redemptions."

Section 149.020, RSMo Cum. Supp. 1961, reads in part as follows:

"1. A tax shall be paid on the sale of cigarettes made of tobacco, or any substitute for tobacco, of two mills per cigarette.

"2. This tax shall be paid by affixing stamps in the manner and at the time set forth in this chapter. The stamps shall be affixed to each individual package of cigarettes by the person who first sells the cigarettes within this state. All cigarettes must be stamped before being sold in this state.

* * * * *

"4. Every person required to pay this tax shall add the amount of the tax to the sales price of the cigarettes, it being the purpose and intent of this law that the tax is in fact a levy on the consumer or user with the person first selling the cigarettes acting merely as an agent of the state for the payment and collection of the tax to the state."

As noted in your letter, paragraph 4 was added to Section 149.020 by an amendment enacted in 1961; and your question is whether the addition of said paragraph affects our prior opinion concerning refunds. The only other amendment to the above quoted provisions of Section 149.020 subsequent to our prior opinion was the increase in the rate of tax from one mill to two mills per cigarette.

In our prior opinion we stated in part as follows:

"By the express terms of section 149.040, refunds may be made only to wholesalers; and the reasonable construction of the words, 'the wholesaler', in the context in which they appear in that section, is that the wholesaler entitled to a refund is the one who paid the tax by affixing stamps to the cigarettes with respect to which the refund is sought. This is in accordance with the usual meaning of the term 'refund', namely, that it is a payment of something back to the party from whom it was received.

* * * * *

"One of the definitions given for the term 'refund' in the above quotation is, 'to pay back by the party who has received it, to the party who has paid it, money which ought not to have been paid.' It is believed that it is in this sense that provision is made for the refunds of the cigarette tax.

"Section 149.020, quoted above, provides that the tax shall be paid by affixing stamps and that the stamps shall be affixed by the person who first sells the cigarettes within this state. In other words, the first sale of cigarettes within this state is a taxable transaction and the tax is due and payable through the affixing of stamps at the time of such first sale.

"In normal operation, in anticipation of sales which will be made, it is necessary

for wholesalers to affix stamps to cigarettes which may never become the subject of taxable sales because after affixing the stamps the wholesaler may sell the cigarettes outside the State of Missouri or, prior to sale by the wholesaler, the cigarettes may become unfit for use and consumption or unsalable or be destroyed. In such cases, by affixing the stamps, the wholesaler will have paid a tax which ought not to have been paid; and the statutory provisions for refunds make it possible for him to obtain reimbursement for the tax which he has paid but did not owe. That, we believe, is the sole purpose and effect of the provision for refunds. After the cigarettes have once been sold by the wholesaler within the State of Missouri, there has been a taxable transaction and there is nothing to be refunded which ought not to have been paid."

We still are of the opinion that a refund can be made only to the wholesaler who paid the tax. Also, the law is still clear that the tax must be paid by the person who first sells the cigarettes within this state.

However, by the addition of paragraph 4 to Section 149.020, the law now provides that the person paying the tax shall add the tax to the sales price of the cigarettes, and that it is the intent that the tax shall be a levy on the consumer or user, with the first seller acting as an agent of the state in paying and collecting the tax.

In view of this change in law, it is believed that, where cigarettes are returned to the wholesaler who paid the tax and the wholesaler refunds the tax to the person returning the cigarettes, the wholesaler is in substantially the same position as though he had not sold the cigarettes and should be entitled to a refund of the tax paid by him if the cigarettes become unfit for use or consumption or unsalable or are destroyed. The wholesaler will have paid a tax which the law contemplates shall be "passed on" to the ultimate consumer but, in the circumstances just stated there can be no recovery of the tax by the wholesaler through a sale of the cigarettes.

CONCLUSION

It is the opinion of this office that, where cigarettes are returned to the wholesaler who first sold the cigarettes in this state and who paid the state cigarette tax thereon and the wholesaler refunds the cigarette tax to the person returning the cigarettes, the tax paid by the wholesaler on such cigarettes may be refunded to him by the state if the cigarettes become unfit for use and consumption or unsalable or are destroyed.

The foregoing opinion, which I hereby approve, was prepared by assistant, John C. Baumann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

OPINION NO. 351 (17-1962)

Answered by letter.

March 1, 1962



Honorable Joe H. Miller
Prosecuting Attorney of
Carroll County
Carrollton, Missouri

Dear Mr. Miller:

This is in response to your request for advice as to whether the person who is both county highway engineer and county surveyor in Carroll County may accept compensation from a drainage district in Carroll County for work performed at its request.

In your initial request you indicated that the engineer-surveyor might, in the course of his employment by the drainage district, perform some work on the highway bridges across the drainage ditch. However, you subsequently advised that the work of the engineer-surveyor for the drainage district would be limited to "overseeing the repairing and maintenance of the drainage ditch such as clearing the brush, maintaining the flood gates and work of that nature." In view of this latter fact we would have no hesitancy in holding that the engineer-surveyor may be so employed.

This position is based on the premise that the maintenance of the ditch itself is in no way related to the duties of county highway engineer or those of county surveyor. If the maintenance of the ditch were part of or germane to the official duties of either the surveyor or engineer, the person involved herein would not be entitled to any compensation for his drainage district work

Hon. Joe H. Miller

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March 1, 1962

beyond that which he regularly receives in his dual capacity as engineer-surveyor. This rule received comprehensive treatment in an opinion issued by this office on September 8, 1961, to the Honorable Proctor N. Carter. A copy of that opinion is attached herewith.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enclosure

AFS:mc

ELECTIONS:
CITIES, TOWNS AND VILLAGES:
MUNICIPAL CORPORATIONS:
CONSTITUTIONAL LAW:

No election may be held in the City of Hannibal to name city officials on a partisan basis pursuant to the charter amendment of August 22, 1961, prior to the second Tuesday in April, 1963, the next regular election date.

OPINION NO. 356 (1961) 18 (1962)

March 22, 1962

Honorable Harold L. Volkmer
Prosecuting Attorney
Marion County
Hannibal, Missouri

18

Dear Sir:

We are in receipt of your request for an opinion of this office, which request reads as follows:

"On April 30, 1957, the qualified electors of the City of Hannibal, by a majority vote, voted to form a government for the City of Hannibal, Missouri, and adopted the Charter for the City of Hannibal, a copy of which is herewith enclosed. Thereafter on August 22, 1961, the qualified electors of the City of Hannibal adopted certain amendments to said City Charter, copies of which are herewith enclosed. The gist of the amendments to the Charter were that the election of the elected city officials was made on a partisan, political basis rather than on a non-partisan, nonpolitical basis, as under the Charter form. It also has done away with the office of administrative assistant, an appointive office, and the amendments also made the offices of city attorney, municipal judge, and chief of police elective rather than appointive.

"The amendments did not provide for any special election in the event that they were enacted. The only provisions calling for an election are in Section 18.01 (1),

Honorable Harold L. Volkmer

which provides that primary elections shall be held upon the second Tuesday of April, 1961, and on each odd-numbered year thereafter and 18.01 (9), which provides that there shall be a general municipal election on the first Tuesday in May, 1961, and every two years thereafter.

"Thus, I would like your official opinion as to whether or not under the amendments to the City Charter there must be a special election for the city officials prior to April 1, 1963, or whether the election shall be held on April 1, 1963."

Upon further inquiry we received the following timetable of the events in question:

April 4, 1961 - General municipal election held for the purpose of electing a Mayor, Councilmen at large, and Ward Councilmen on a nonpartisan basis pursuant to Sec. 18.01 of the 1957 Charter.

April 19, 1961 - Petition submitted to City Council calling for amendment of 1957 Charter to provide for election of City officials on a partisan basis.

June 20, 1961 - Ordinance enacted providing for submission of proposed amendment to the electorate.

August 22, 1961 - Special Election held at which proposed amendment was adopted.

As you note in your letter, Section 18.01(1) of the Charter of the City of Hannibal, as amended on August 22, 1961, provides for the nomination of certain city officials at a primary election to be held on the second Tuesday in April, 1961, and on the same day of each odd-numbered year thereafter. That section is as follows:

"Section 18.01 (1) There shall be a primary municipal election for the purpose of nominating a mayor, municipal

Honorable Harold L. Volkmer

judge, chief of police, city attorney, councilmen and members of the City Central Committees, and for the purpose of deciding any question that may lawfully be submitted to the electors, held upon the 2nd Tuesday in April, 1961, and on each odd numbered year thereafter. There may be special elections called by the city council as provided in the Charter."

Section 18.01(9) of the Charter as amended provides for a general municipal election for the purpose of electing the above-named officials on the first Tuesday of May, 1961, and every two years thereafter.

The question thus presented is whether the decision of the people of Hannibal to change the manner in which their city officials are named is to be given effect as of the effective date of the amendment, or whether it is to be postponed until 1963.

Generally, the amendment of August 22, 1961, does not purport to vacate city offices, with certain exceptions hereinafter noted, prior to the first regular election under the amendment, nor does it specifically provide for a special election to elect these officials on a partisan basis. The only dates set out in the amendment regarding the holding of the elections there provided for are the second Tuesday of April and the first Tuesday of May, 1961, and the corresponding days of subsequent odd-numbered years. It obviously has been impossible to observe the terms of the amendment with respect to the 1961 elections, and therefore any election held pursuant to the amendment prior to the second Tuesday of April, 1963, must be a special election. In *Dysart v. City of St. Louis*, 321 Mo. 514, 11 SW2d 1045, the Supreme Court, en Banc, stated (l.c. 1053):

"The rulings in other states are conflicting upon this subject, but the weight of the authority favors the definition that a special election means one taking place at a time different from that at which an election fixed by law is held."

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The rule with regard to the holding of a special election is set out in *State ex inf. Mooney ex rel. Stewart v. Consolidated School Dist. No. 3*, Mo. App., 281 SW2d 511, 513, as follows:

" * * * But it is fundamental that no valid election can be called and held except by authority of the law, and that where the law places the duty of calling or ordering a special election in the hands of some authority or agency an election held without such call is a nullity. * * *"

See also *State ex inf. Rice ex rel. Allman v. Hawk*, 360 Mo. 490, 228 SW2d 785, and *State ex rel. Edwards v. Ellison*, 271 Mo. 123, 196 SW 751.

In *State ex rel. McHenry v. Jenkins*, 43 Mo. 261, the Constitution of 1865 provided for an election to fill the office of county clerk in 1866 and every four years thereafter. No such election was held in 1866, but in 1868 the relator was elected county clerk. His title to the office was challenged and the Court held the 1868 election invalid, saying (l.c. 265):

"In relation to relator's second claim, that the omission to hold an election in 1866 can be supplied by one in 1868, we can only say that it is a valid one if the law provides for any such election. But he has failed to show us any such provision, and it would be difficult to give legal validity to a volunteer election. No election can be had unless provided for by law. As the law makes no provision for the election of clerks in 1868, such election is wholly void and of no effect. This position has never been questioned. In *The State v. Robinson*, 1 Kansas, 17, a question was raised as to the validity of an election for governor, and it was held that the election under consideration was not provided for by law, that the person elected could not take the chair, and that the

previous governor should hold over until the next general election. No case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired."

Applying the principles enunciated in the foregoing cases to the situation with which the City of Hannibal is presently faced, it can be seen that no election may be held to nominate candidates for mayor, councilman, etc., under the amendment, prior to April, 1963, unless the Constitution or statutes of Missouri, or the city charter, authorizes such election. Sections 19 and 20 of Article VI of the Constitution of Missouri, dealing with the adoption and amendment of home rule charters, contain no provisions authorizing the holding of such election, nor do we find such authority in the Missouri statutes pertaining to constitutional charter cities having a population of less than 300,000. Sections 82.010 thru 82.290, RSMo 1959.

Turning then to the charter itself, Section 18.01 of the original charter prior to amendment provided that, "There may be special elections called by the City Council." However this section has been repealed by the amendment and the comparable amended section, §18.01(1), has been altered to read that, "There may be special elections called by the City Council as provided in the charter." (Emphasis ours.) Thus, any authority for a special election of this nature must be found in some other charter section.

Section 18.12 of the Charter provides as follows:

"Section 18.12. FAILURE TO HOLD ELECTION NOT TO BE DEEMED A LAPSE. If, for any reason, an election shall not be held on the date specified in this charter or in any order of the Council calling for a special election, the election shall not be deemed thereby to have lapsed, but the same shall be held at the earliest possible date to be designated by the Mayor after due notice has been published as may be required by the ordinances of this city."

It might be contended that the amendment of August 22, 1961, specifically directs that a primary election be held on the second Tuesday of April, 1961, and that because that election was not then held the Mayor should direct that it be held

Honorable Harold L. Volkmer

"at the earliest possible date," particularly since the above section refers to a failure to hold an election on the date specified "for any reason." In order to test the validity of such a contention it is first necessary to determine the effective date of the amendment.

Section 21.01 of the charter states that any amendment to the charter shall become a part of the charter, "at the time and under the conditions fixed in the amendment." Section 20 of Article VI of the Missouri Constitution contains an identical provision. However, the amendment of August 22 is silent as to the effective date. Therefore, we must apply the established rules of construction regarding the operation of amendments.

In *City of Kansas City v. Stegmiller*, 151 Mo. 189, 52 SW 723, the contention was made that an amendment to the Kansas City charter was not effective until thirty days after its approval by the electorate. The amendment itself made no mention of the effective date. The Supreme Court said (1.c. 727):

"Another objection to the extension is that, in violation of section 1885, Rev. St. 1889, territory was annexed to the city within four months next preceding the general city election held in Kansas City April 5, 1898. The facts are, as already stated, that the election at which the proposed amendment was voted on was held December 2, 1897. The next city election was held April 5, 1898. Four months had clearly intervened, unless defendants' further contention that the amendment did not take effect for 30 days after its adoption be true. But there is no such provision of the constitution. Unless otherwise provided, either by the constitution or laws, all laws and amendments take effect from the date of their approval. End. Interp. St. §§ 498, 539."

From the foregoing it can be seen that the amendment of August 22 became effective upon the approval of the voters.

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Therefore any construction of Section 18.12 of the charter which would permit a special election prior to April, 1963, must involve the retroactive operation of the amendment, since on the primary election date fixed in the amendment there was no legal authority for that election, and such date could only be arrived at after approval of the amendment.

With regard to the retroactive operation of constitutional provisions, the Supreme Court said in State ex rel. Scott v. Dircks, 211 Mo. 568, 111 SW 1, 3:

" * * * The settled rule of construction in this state, applicable alike to the Constitutional and statutory provisions, is that, unless a different intent is evident beyond reasonable question, they are to be construed as having a prospective operation only." (Citing authorities.)

Nothing in the amendment of August 22 evidences an intent that the amendment shall operate other than prospectively. Therefore, following the principle above quoted, the amendment may not be construed to operate retroactively so as to permit the application of Section 18.12 authorizing an election prior to April, 1963.

Sections 2.04 and 3.07 of the charter provide for a special election to fill a vacancy in the office of councilman and mayor, respectively. The amendment does not, in specific terms, vacate any of the city offices. However, it does operate to abolish the office of administrative assistant to the mayor, to combine the offices of city counselor and city attorney, and to create three new council seats. Since no vacancy in the office of mayor is created by the amendment, Section 3.07 does not provide the necessary authority to hold a special election for that office on a partisan basis.

With regard to Section 2.04, the amendment of August 22 has, in effect, created three vacancies on the city council. The amendment provides for the enlargement of the council from nine to twelve members, as of the effective date of the amendment. Since it does not operate to remove the incumbent council members prior to the first regular election under the amendment, nine of the twelve seats are filled with three

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vacancies remaining. Thus we must determine the possible application of Section 2.04 to authorize a special election for the three vacant positions on the council.

Section 2.01 of the amendment, changing the council membership from nine to twelve, reads as follows:

"Section 2.01: NUMBER AND TERM OF COUNCILMEN. The Council shall consist of twelve members to be known as councilmen, two councilmen to be elected by the qualified voters of each of the six wards for a term of four years. Each councilman shall serve until his successor shall be elected and qualified. Of the first council elected hereunder, the councilman from each ward receiving the highest number of votes shall be elected for a term of four years, the councilman receiving the next highest number of votes shall be elected for a term of two years. Thereafter all councilmen shall be elected for a term of four years."

By this section, a comprehensive scheme is set up for altering the composition of the council, including a system of staggered terms for "the first Council elected hereunder." A special election held under Section 2.04 would necessarily cause the junking of this detailed plan. It would be impossible to allocate the three seats to be filled at such election in a manner consistent with the amendment creating them. The system of staggered terms obviously contemplates that the entire membership of the council will initially be elected at one time.

Both Section 2.04 of the original charter and Section 2.01 of the charter as amended cannot be given effect in these circumstances. Therefore, as the Supreme Court said in *State ex inf. McKittrick v. Bode*, 342 Mo. 162, 113 SW2d 805, 808, "The amendment must prevail because it is the latest expression of the will of the people." We note also that Section 2.04 is not unqualified in prescribing the manner in which council vacancies shall be filled, inasmuch as the application of that section is limited by the phrase, "except as otherwise provided herein." In these circumstances, Section 2.01 of the amendment constitutes the "otherwise" there mentioned. For

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these reasons, it is our opinion that no special election may be held pursuant to Section 2.04 of the charter to fill the three council seats created by the amendment.

We have found no other charter section which might be thought to authorize the special election of which you inquire.

CONCLUSION

It is therefore the opinion of this office that there is no legal authority for the holding of a special election in the City of Hannibal to elect the city officials in the manner designated by the Charter amendment of August 22, 1961, prior to the second Tuesday of April, 1963.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

OPINION REQUEST
No. 360(1961)
No. 19(1962)
~~Answered by letter.~~

March 26, 1962



Honorable Stephen E. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Strom:

This refers to your request for an opinion concerning the employment of prisoners in your county pursuant to Section 221.170, RSMo 1959, as amended by House Bill No. 194, 71st General Assembly.

Section 221.170, as so amended, may be somewhat ambiguous on its face. However, a review of the legislative history of House Bill No. 194 makes it clear that the intent of that bill was to change the law only in counties of the first class under charter form of government and counties containing a city of the first class and that paragraphs 1 to 12, inclusive, of amended Section 221.170 should have no application to other counties.

As introduced, House Bill No. 194 would have repealed Section 221.170 and enacted in lieu thereof the provisions now contained in paragraphs 1 to 11, inclusive, of amended Section 221.170, except that the first part of paragraph 1 read as follows: "Any person sentenced to a county jail or to a workhouse in cities outside a county for crime, * * *." The House amended the bill by adding what now appears as paragraph 12 except that the first part of the paragraph read as follows: "Any county or city outside of a county may suspend * * *." (See Perfected Bill.) The Senate amended the bill to change the first parts of paragraphs 1 and 12 to read as they now read in amended Section 221.170. (See Senate Journal for June 21, 1961, pages 1316 and 1317.) Finally, a conference committee amendment which added what now appears as paragraph 13 in amended Section 221.170 was adopted. (See Senate Journal for June 30, 1961,

pages 1586 and 1587, and House Journal for June 29, 1961, page 2045, and June 30, 1961, pages 2072 and 2073.)

The obvious purpose of the amendments during the course of passage of the bill was to reject the proposal that the change in the law with respect to the employment of prisoners should be applicable throughout the state and to provide, instead, that the law should remain unchanged except in counties of the first class under charter form of government and counties containing a city of the first class. Thus, there was no change in the law applicable to Cape Girardeau County, a county of the third class.

It is believed that this basically answers your questions concerning the employment of prisoners under amended Section 221.170. For your county to undertake to apply the principles of the provisions contained in paragraphs 1 to 12 of the amended section would be contrary to the intent of the General Assembly in enacting such amended section. The disbursement of earnings of prisoners in accordance with such provisions would be in direct conflict with the provision of paragraph 13 of the amended section which, as noted in your letter, provides that earnings shall be applied upon the judgment against the prisoner. Also, the employment of prisoners in Cape Girardeau County in the manner contemplated by paragraphs 1 to 12 of the amended section would run afoul of restrictions upon the release of custody of prisoners by the sheriff. In this connection, we are enclosing a copy of an opinion furnished by this office to John Hosmer on December 20, 1954.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

1 enclosure

COUNTY TREASURERS:
COUNTIES:
COMPENSATION:

County treasurers in class 3 and 4 counties under township organization are entitled to compensation as provided under Section 54.275, RSMo 1959, in addition to compensation they are entitled to receive under Section 54.320, RSMo 1959.

February 21, 1962

OPINION NO. 21



Honorable John K. Leopard
Prosecuting Attorney
Daviness County
Gallatin, Missouri

Dear Mr. Leopard:

In your letter of October 9, 1961, you requested an opinion from this office as follows:

"As prosecuting attorney I have been requested by Mr. Lee R. Pierce, Treasurer of Daviness County, to write your office for an opinion concerning the compensation which a county treasurer is entitled in a county of the third class under the township organization form of government.

"More specifically, the question which Mr. Pierce poses is whether he is entitled to both the minimum salary of \$100 per month, as provided in Section 54.320 of the 1959 Revised Statutes, and to the additional compensation of \$600 per year, as provided in Section 54.275(2) of the 1959 Revised Statutes.

"The local county court has raised the question as to whether Mr. Pierce is entitled to the additional \$600 per year; I have given both them and Mr. Pierce my written opinion that he is entitled to both forms of compensation since it seems that Section 146.056 of the 1959 statutes imposes

Honorable John K. Leopard

the duties therein specified upon treasurers of all counties without regard to the form of county government, but nevertheless, I think they both feel that an opinion from your office would better determine the matter."

Daviess County is a third class county under township organization with a population of 9,502.

Section 54.320, RSMo 1959, provides:

"The county treasurer in counties of the third and fourth classes adopting township organization shall be allowed a salary of not less than one hundred dollars per month by the county court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of three per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes; he shall receive nothing for paying over money to his successor in office."

Section 54.275, RSMo 1959, provides in part:

"For the additional duties imposed upon county treasurers by section 146.056 RSMo, they shall receive the following additional compensation, to be paid in the same manner and from the same funds as county treasurers are now paid provided said treasurer shall have used diligence in securing and preparing the additional list and shall have forwarded the same to the director of revenue.

* * *

"(2) In class three counties having a population of less than twelve thousand five hundred, six hundred dollars per annum."

Honorable John K. Leopard

Section 146.056, mentioned in the above section, requires the county treasurer to mail to each intangible taxpayer a form prepared and furnished by the Director of Revenue for use by such taxpayers in making his tax rate on intangible property. It also requires the county treasurer to mail a list of any additional names he has added to the list of intangible taxpayers as supplied by the Director of Revenue to the Director of Revenue.

Section 54.320, supra, provides the compensation to be allowed county treasurers of third and fourth class counties under township organization.

Section 54.320 has had no substantial change in language except as to amount of compensation, has been in effect many years and was in effect prior to the enactment of House Bill 199.

Section 54.275 was first enacted in 1951, Laws 1951, page 867 as part of House Bill 199, the title of the act being as follows:

"AN ACT relating to intangible personal property tax returns and to the duties of treasurers of counties under charter form of government and of the class two, three and four counties of the state and providing compensation for county treasurers for performing the additional duties required by this act."

Section 1 of House Bill 199 requires the State Director of Revenue to furnish forms for the use of taxpayers in making their returns for intangible property taxes. Section 2 of the act requires the county treasurer to mail these forms to each taxpayer listed as being subject to an intangible property tax. Section 3 of the act allowed additional compensation for the new duties imposed on county treasurers under the provisions of the act.

Section 1 of House Bill 199 expressly provided it was to be applied to county treasurers of each county under charter form of government and to the county treasurer of class two, three and four counties. A county treasurer is a county treasurer within this statute even though the county is under township organization. The duty of mailing the tax forms was placed upon county treasurers without regard to the form of county government and for such additional duties the county treasurers were allowed additional compensation as provided under Section 3 of House Bill 199.

Honorable John K. Leopard

When House Bill 199 was enacted the compensation allowed county treasurers in counties under township organization was governed by Section 54.320, RSMo 1949.

County treasurers in other counties were allowed compensation under statutory provisions.

Section 1 of House Bill 199 is now designated in the Revised Statutes as Section 146.055, RSMo 1959. Section 2 of House Bill 199 is now Section 146.056, RSMo 1959. Section 3 of House Bill 199 is now Section 54.275, RSMo 1959. The fact that House Bill 199 has been separated and its sections given new section numbers and placed under different chapters under the Revised Statutes does not or should not change or alter their meaning. They must be construed as originally enacted. Their meaning and effect is the same as when they were originally enacted. In *Pierce City vs. Hentschel*, 210 S.W. 31, 1.c. 32, the Supreme Court stated:

"A law as first enacted, with the provisions of which it originally formed a part, should be considered in ascertaining its meaning, rather than other laws with which it may be grouped in the Revised Statutes, *Timson v. Coke Co.*, 220 Mo. 580, 119 S.W. 565; *Paddock v. Railway Co.*, 155 Mo. 524, 56 S.W. 453; *Aloe v. Ass'n*, 164 Mo. 675, 55 S.W. 993. * * *"

The fact that Section 54.275 is now grouped with other statutes relating to county treasurers as separate from county treasurers under township organization does not restrict its application to county treasurers other than those under township organization. When first enacted it applied to all county treasurers and it must be so applied at the present time.

CONCLUSION

It is our opinion that county treasurers in class three and four counties under township organization are entitled to compensation as provided under Section 54.275, RSMo 1959, in addition to the compensation they are entitled to receive under Section 54.320, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

MM:BJ

THOMAS F. EAGLETON
Attorney General

SCHOOLS:
SCHOOL BOARDS:
VACCINATIONS:
PHYSICIANS:
PHYSICAL EXAMINATIONS:
DENTISTS:
DENTAL EXAMINATIONS:
SCHOOL COURSES:

(1) School boards may make rules and regulations requiring compulsory vaccination only where there is a threat of epidemic or an actual epidemic. (2) School boards may make rules and regulations requiring tuberculosis and general physical tests by a physician to determine existence of contagious or infectious diseases. (3) School boards may not require a dental examination by a dentist as a prerequisite to attendance in school, because a dentist is not a physician. (4) A school board may require a child in secondary school to take certain health courses as prerequisites to graduation.

Opin No. 22 ('62)
" " 371 ('61)

March 27, 1962

Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri



Dear Mr. Anderson:

This is in reply to your letter of October 10, 1961, inclosing a letter from George W. Vossbrink and requesting an opinion from this office on the following four questions:

- "1. Can a board of education require vaccination when there is no indication that smallpox is prevalent?
- "2. Are tuberculosis and general physical tests included under its 1935 ruling for medical inspections for the purpose of determining the existence of a contagious or infectious disease?
- "3. May dental examinations be required as a pre-requisite to attendance in school?
- "4. Can the board of education require that a child in secondary school take certain health courses as pre-requisites to graduation?

We will answer the questions in the order presented.

Section 163.010, RSMo 1959, reads, in part, as follows:

Honorable Norman H. Anderson

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"The board of directors or board of education shall have power to make all needful rules and regulations for the organization, grading and government in their school district -- said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, * * * ."

In the case of *In the Matter of Rebenack*, 62 Mo. App. 8, the St. Louis Court of Appeals upheld a rule of a school board that all children must be vaccinated. The opinion in that case does not disclose whether an epidemic was present or threatened in the school district.

In the case of *State ex rel. O'Bannon v. Cole*, 220 Mo. 697, 119 SW 424, the Supreme Court of Missouri upheld a similar rule requiring compulsory vaccination in a school district where there was an actual smallpox epidemic.

On October 29, 1935, this office issued an opinion to the State Board of Health, Jefferson City, Missouri, in which it was held that the board of education of a school district is authorized to make reasonable rules and regulations respecting compulsory vaccination and medical inspection, and that the reasonableness of such rules and regulations are to be determined by the facts existing at the time the rules are made, and that, without question, a rule providing for a compulsory vaccination without expense to the pupil when smallpox is prevalent within the district, would be reasonable, as would a rule providing for medical inspection for the purpose of determining the existence of contagious or infectious disease or the liability of transmitting the same.

Honorable Norman H. Anderson

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On October 14, 1946, this office issued an opinion to Honorable A. L. Gates, Prosecuting Attorney, Moniteau County, California, Missouri, in which it was held that if there is an epidemic or threat of an epidemic of smallpox, then the school board is authorized to adopt an order requiring all children to be vaccinated against smallpox before they are permitted to enroll and attend school; otherwise not.

The 71st General Assembly enacted a law, effective October 13, 1961, now Section 163.017, RSMo Cum. Supp. 1961, which reads, in part, as follows:

"1. The division of health of the department of public health and welfare, after consultation with the department of education, shall promulgate rules and regulations governing the immunization against poliomyelitis, smallpox, and diphtheria, to be required of children attending public, private, parochial or parish schools. Tetanus and pertussis may be included in the vaccine administered. The immunizations required and the manner and frequency of their administration shall conform to recognized standards of medical practice. The division of health of the department of public health and welfare shall supervise and secure the enforcement of the required immunization program.

"2. It is unlawful for any student to attend school for longer than one month unless he has been immunized, as required under the rules and regulations of the division of health of the department of public health and welfare, and can provide satisfactory evidence of such immunization; provided, that, if within the month, he produces satisfactory evidence of

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having begun the process of immunization, he may continue to attend school as long as the immunization process is being accomplished in the prescribed manner. It is unlawful for any parent or guardian to refuse or neglect to have his child immunized, as required by this section, unless the child is properly exempted.

"3. This section shall not apply to any child if one parent or guardian objects in writing to his school administrator against the immunization of the child."

We are of the opinion that Section 163.017, RSMo Cum. Supp. 1961, does not require any change in the opinions of this office, as expressed in the opinion of October 29, 1935 to the State Board of Health, and the opinion of October 14, 1946 to Honorable A. L. Gates. Section 163.017 does not abrogate the power of local school boards to make rules and regulations under the provisions of Section 163.010, RSMo, and, when reasonable rules are promulgated under the authority of Section 163.010, RSMo, there is no conflict between such rules and Section 163.017. Section 163.017 contemplates and establishes a program of immunization to be conducted by the Division of Health of the Department of Public Health and Welfare. Such immunization program is not in lieu of any local vaccination program of a school district, but it is an entirely separate, distinct, and additional immunization program on a statewide basis. Of course, any rules and regulations of a school board under the authority of Section 163.010 must be reasonable and they must not be in conflict with any state law; and, therefore, any rule of the school board respecting immunization or vaccination of school children cannot be in direct conflict or in opposition to the provisions of Section 163.017, RSMo Cum. Supp. 1961.

Therefore, in answer to your first question, it is the opinion of this office that there is no change in the

Honorable Norman H. Anderson

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authority of a school board to make reasonable rules concerning the vaccination of school children in that district, and the opinion of this office expressed in the opinion of October 29, 1935 to the State Board of Health, and the opinion of October 14, 1946 to Honorable A. L. Gates remains unchanged. Hence, the Board of Education may not require vaccination when there is neither an existing nor a threatened epidemic of smallpox.

In answer to the second question concerning tuberculosis and general physical tests, it was held in the opinion of October 29, 1935 to the State Board of Health that the school district was authorized to make reasonable rules and regulations respecting a medical inspection; that the reasonableness of such rules and regulations are to be determined by the facts existing at the time the rules are made, and that a rule providing for medical inspection for the purposes of determining the existence of contagious or infectious disease or the liability of transmitting the same would be reasonable. Webster's dictionary defines "tuberculosis" as "an infectious disease caused by the tubercle bacillus." Since tuberculosis is an infectious disease, any rule of the school board under authority of Section 163.010, RSMo 1959, requiring any child to be examined by a physician for the purpose of determining the diseased condition, or the liability of transmitting such disease, would certainly be reasonable and proper.

In answer to the third question, we refer you to Section 163.360, RSMo 1959, which reads, in part, as follows:

"It shall be unlawful for any child to attend any of the public schools of this state while afflicted with any contagious or infectious disease, or while liable to transmit such disease after having been exposed to the same. For the purpose of determining the diseased condition, or the liability of transmitting such disease, the teacher or board of directors shall have power to require any child to be examined by a physician

or physicians, and to exclude such child from school so long as there is any liability of such disease being transmitted by the same. A refusal on the part of the parent or guardian to have an examination made by a physician or physicians, at the request of the teacher or board of directors, will authorize the teacher or board of directors to exclude such child from school; * * * ."

The answer to this question will then depend upon the character of the dental examination and the person or physician who conducts the examination. Certainly, there are infectious and contagious diseases of the mouth and teeth, and a reasonable rule requiring an examination by a physician to determine the diseased condition or the liability of transmitting such disease would be proper, in the same manner as any other examination authorized under the conditions prevailing in the second question answered above. However, an examination by a dentist to discover or treat cavities in the teeth presents a different situation. Section 163.360, RSMo, authorizes the examination to be made by a physician or physicians. The general definition of a "physician" in Webster's dictionary is given as, "A person skilled in ... the art of healing; one duly authorized to treat diseases" And Section 332.010, RSMo 1959, gives a definition of a "dentist" as "Any person ... who shall treat or profess to treat, or advertise as treating, any disease or disorder or lesions of the oral cavity, teeth, gums, maxillary bones, or extract teeth, or repair or fill cavities"

However, we do not believe this is sufficient to classify a dentist as a physician in the sense in which the word "physician" is used in Section 163.360. Section 334.021, RSMo 1959, states as follows:

"Where other statutes of this state use the terms 'physician', 'surgeon', 'practitioner of medicine', 'practitioner of osteopathy', 'board of medical examiners', or 'board of osteopathic registration and examination' or similar terms, they shall be construed to mean physicians and surgeons

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licensed under this chapter or the state board of registration for the healing arts in the state of Missouri."

Under the definition of a "physician" in Section 334.021, RSMo 1959, a dentist is not a physician, because a dentist is not licensed under Chapter 334., RSMo, and a dentist is not licensed under the State Board of Registration for the Healing Arts in the State of Missouri. Rather, a dentist is licensed under Chapter 332., RSMo, and is under the Missouri Dental Board. Therefore, our answer to the third question is that a dentist is not a physician within the meaning of that term as used in Section 163.360, and a school board does not have authority to require a dental examination by a dentist as a prerequisite to attendance in school.

In answer to the fourth question, we again rely on the authority of the school board expressed in Section 163.010 which is quoted above. Since the school board may make all needful rules and regulations for the organization, grading and government in their school district, a reasonable rule requiring a child in secondary school to take certain health courses as a prerequisite to graduation would seem proper. As further authority, we call your attention to Section 163.170, RSMo 1959, which reads as follows:

"Physiology and hygiene, including their several branches, with special instruction as to tuberculosis, its nature, causes and prevention, and the effect of alcoholic drinks, narcotics and stimulants on the human system, shall constitute a part of the course of instruction, and be taught in all schools supported wholly or in part by public money or under state control."

We do not know the exact nature of the "certain health courses" mentioned in the opinion request, but we believe that the usual and normal courses on general health would be included within the phrase "physiology and hygiene" which are required as a constituent part of the course of instruction in all schools by Section 163.170. We are therefore of the opinion that the Board of Education may require that a child in secondary school take certain health courses as a prerequisite to graduation.

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CONCLUSION

It is therefore the opinion of this office, as follows:

1. The Board of Education of a school district is authorized to make reasonable rules and regulations respecting compulsory vaccination or immunization of school children where there is a threat of epidemic or an actual epidemic, and the reasonableness of such rules and regulations are to be determined by the facts existing at the time the rules are made, but the Board of Education does not have such power except where there is a threat of epidemic or an actual epidemic.
2. The Board of Education of a school district is authorized to make rules and regulations respecting tuberculosis tests and general physical tests, to be included in an examination of the children of the school district, by a physician or physicians for the purpose of determining the existence of contagious or infectious disease, or the liability of transmitting the same.
3. The Board of Education of a school district does not have authority to require a dental examination by a dentist as a prerequisite to attendance in school, because a dentist is not a physician within the meaning of that term as used in Section 163.360.
4. The Board of Education of a school district may require that a child in secondary school take certain health courses as prerequisites to graduation under authority of Sections 163.170 and 163.010, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WW:mc

COUNTY PLANNING COMMISSION:

COUNTIES OF THIRD AND FOURTH CLASS:

Areas within a municipality that has not enacted a city plan should be included in the county master plan.

January 26, 1962

Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Mr. Wilson:

In your letter of October 12, 1961, you request an opinion from this office regarding the following questions:

"I would like to have the opinion of your office concerning two problems which occasionally arise with the Platte County Planning Commission. The Platte County Planning Commission was set up by the County Court of Platte County, Missouri under the provisions of House Bill 465, Laws of Missouri, 1951.

"Some of our incorporated areas are municipalities legally incorporated as such and regularly functioning as such at this time. If these areas have no zoning and planning ordinances of their own, does the Platte County Planning Commission have authority to set up and enforce zoning and planning regulations within these areas?

"Some of our incorporated areas are municipalities legally incorporated as such, but which have ceased to function as such, although they have not been dissolved in accordance with the applicable statutory proceedings. Does the Platte County Planning Commission have authority to set up and enforce zoning and planning regulations within these areas?"

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Platte County, Missouri, is a third class county with 23,350 inhabitants and provisions of Section 64.510 through 64.690, RSMo 1959 as amended, govern the county planning and zoning in said county.

Section 64.510, RSMo Cum. Supp. 1961, provides:

"The county court of any county of the second or of any county of the third class having more than twenty-three thousand inhabitants may, after approval by vote of the people of the county, provide for the preparation, adoption, amendment, extension and carrying out of a county plan for all areas of the county outside the corporate limits of any city, town or village which has adopted a city plan in accordance with the laws of the state. Upon the adoption of the county plan there is created in the county a county planning commission as hereinafter provided." (Emphasis supplied)

Attention is called to the fact that this section expressly states that after approval by the vote of the people in the county the county court may provide for the preparation and carrying out of a county plan for all areas of a county outside the corporate limits of any city, town or village which has adopted a city plan.

Section 64.570, RSMo 1959, which provides for the county planning commission to pass upon all improvements of the type embraced within the master plan, provides:

"From and after the adoption of the official master plan or portion thereof and its proper certification and recording, thereafter no improvement of a type embraced within the recommendations of such official master plan or part thereof shall be constructed or authorized without first submitting the proposed plans thereof to the county planning commission and receiving the written

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approval or recommendations of said commission. This requirement shall be deemed to be waived if the county planning commission fails to make its report and recommendations within forty-five days after receipt of the proposed plans. In the case of any public improvement sponsored or proposed to be made by any municipality or other political or civil subdivision of the state, or public board, commission or other public officials, the disapproval or recommendations of the county planning commission may be overruled by a two-thirds vote, properly entered of record and certified to the county planning commission, of the governing body of such municipality, or other political or civil subdivision, or public board, commission or officials, after the reasons for such overruling are spread upon its minutes, which reasons shall also be certified to the county planning commission."

It is evident from this statutory provision providing for a municipality to overrule the county plan that it was intended for the county-wide master plan to include municipalities that do not have a city plan, otherwise this provision would be meaningless.

Sections 64.510 to 64.690 deal with county-wide planning and zoning in second and third class counties, and all sections should be read and considered together in construing them in order that they may be harmonized if possible. When all the sections are considered as a whole so that the overall scheme is visualized, we believe it clearly appears that municipalities that have not enacted city zoning plans are to be included within the county master plan. As stated in Section 64.570, the county plan may be rejected by the governing body of the municipality insofar as it may apply to such city.

Regarding the second question you submit, dealing with incorporated cities that are not now functioning as a municipality, certainly such cities would not have a city zoning plan and a county zoning commission should include the territory within such cities in the county master plan.

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CONCLUSION

It is the opinion of this office that the incorporated areas within a municipality that has not enacted a city plan should be included in the county master plan adopted by second and third class counties under provisions of Section 64.510 through Section 64.690, RSMo 1959 as amended. This would include areas within municipalities that are not functioning as municipalities.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

MM:BJ

COUNTY COURT:
COUNTY CLERK:
PAYMENT OF WARRANTS:
COUNTY RECORDS:

A contract made with a county court for services to be rendered the county must be in writing subscribed by the parties thereto with the consideration stated therein and entered on the records of the county court.

February 8, 1962

FILED
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Honorable Earl R. Blackwell
State Senator, 22nd District
Hillsboro, Missouri

Dear Senator Blackwell:

In your letter of October 16, 1961, you request an opinion from this office regarding the matter set forth in a letter you enclosed, which letter reads as follows:

"Recently the County Clerk of Jefferson County presented a statement to the Court for services which he performed for the Court, and at the request of the Court; however, a question has been raised concerning the authority of the Court to honor the statement of the County Clerk.

"The Court would like for you to obtain an opinion from the Attorney General based on the following facts:

On November 8, 1960 the voters of Jefferson County, by majority, voted favorably for the Proposition of Local Option Registration of Voters, as provided by Chapter 114 RSMo 1959, and with this mandate in mind, the same to become operative starting September 15, 1961, the County Court did on December 19, 1960 enter the following order in the County Court Record No. 20 at Page 383:

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"ELECTIONS

Dividing Townships for
Voters Registration
Sec. 111.220 and 114.110
RSMo 1959

Now on this day the Court orders the Clerk to divide the several Townships into election precincts with fixed boundaries for each precinct.

"And, in accordance with said Order, the Clerk proceeded to divide the seven Townships of Jefferson County into election precincts, employing as fixed boundaries the center lines of County and State Highways, Creeks and Rivers, Railroad Rights of Way, and in some instances, section and Survey lines.

"Diligently applying his effort to this project, during after-office hours, on Sundays and Holidays, and during his vacation period, and by attending fifty-eight organization meetings in the County in search of suggestions by the various organizations for equitable distribution of precincts in each Township, the Clerk did on or about September 1, 1961 submit to the County Court seven master maps of the seven Townships of the County defining sixty-two precincts with fixed boundaries encompassing each precinct.

"The County Court, after viewing said Township maps accepted same as the official precinct maps of the County, and starting on September 15, 1961, the County Clerk employed the same maps in registering voters in the sixty two precincts in the County.

"Later, on or about September 29, 1961 the Clerk presented a statement to the County Court for his services in dividing the seven Townships into sixty-two election precincts in the sum of \$3300, which statement was approved for payment by the Presiding Judge and the Associate

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Judge of the 2nd District; the Associate Judge of the 1st District declined to vote.

"The Presiding Judge signed Warrant No. 1158 for payment of said statement to be paid from the Registration and Election category of the 1961 Budget, where ample funds are available but the County Auditor has refused to approve said Warrant for payment without a legal opinion from the Attorney General of Missouri.

"QUERY NO. 1:

Does the County Court have the authority to expend County funds for work delegated by a County Court order to the County Clerk in accordance with the provisions of Section 111.220 RSMo 1959, and as a part of the program for Registration of Voters as provided by Chapter 114 RSMo 1959?"

In substance, it is stated in the letter that on November 8, 1960, the voters of Jefferson County voted favorably for county-wide registration of voters as provided for under Chapter 114, RSMo 1959. On December 19, 1960, the county court of Jefferson County entered the following order in County Court Record No. 20, page 383:

"ELECTIONS
Dividing Townships for
Voters Registration
Sec. 111.220 and 114.110
RSMo 1959

Now on this day the Court orders the Clerk to divide the several Townships into election precincts with fixed boundaries for each precinct."

It is further stated that in accordance with said order the county clerk of Jefferson County proceeded to divide the seven townships of Jefferson County into election precincts employing as fixed boundaries the center lines of county and state highways, creeks and rivers, railroad rights-of-way, and in some instances sections and survey lines. After

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attending many meetings in search of suggestions from various organizations for equitable distribution of precincts in each township, he prepared seven master maps of the county, defining sixty-two precincts with fixed boundaries, and that the county court after viewing the maps accepted the same, and these maps were used later for registering voters. Thereafter on September 29, 1961, the county clerk presented a statement to the county court for \$3300.00 for his services in dividing the seven townships into precincts, which statement was approved for payment by the presiding judge and one associate judge. It is further stated that the county auditor has refused to approve the warrant for payment.

It must be observed that this matter concerns an obligation created by a county court and its validity must depend upon statutory authority.

Section 431.100, RSMo 1959, provides as follows:

"If a claim against a county be for work and labor done, or material furnished in good faith by the claimant, under contract with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceedings prescribed by law."

Section 432.070, RSMo 1959, provides:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

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Attention is called to the fact that Section 431.100, supra, applies only to claims against the county under a contract with county authorities while Section 432.070, supra, applies to counties, cities, school districts, and other municipal corporations. This fact should be kept in mind when construing the holdings made in cases cited in this opinion.

These statutes cited above have been before the courts of this state many times for construction, both in cases involving counties as well as cities.

In Woolfolk vs. Randolph County, 83 Mo. 501, the court had before it a situation where the county court by proper order of record had appointed plaintiff as its agent for and on behalf of said county to compromise and settle the bonded indebtedness of Sugarcreek Township in Randolph County. By the terms of said court order plaintiff was to receive a reasonable compensation for his services. Plaintiff performed the services and presented his bill to the county court amounting to \$700.00. The Supreme Court held in this case that plaintiff was not entitled to recover because the above statutory provisions had not been complied with. The court stated, l.c. 506:

"The petition sufficiently discloses, we think, that the contract sued on did not meet the requirements of the statute, that it was not in writing, dated and signed, as required, and that the value of plaintiff's services was not agreed upon. The allegation is, that plaintiff was to have a reasonable compensation, which is the compensation the law would ordinarily attach where the parties fail to make a contract price, and this, we think, for the reasons given, was not a compliance with the statute, in this essential particular."

In the case of Carter vs. Reynolds County, 288 S.W. 48, the presiding judge of the county court of Reynolds County met with plaintiff, an experienced bridge builder, at a bridge site and orally agreed with plaintiff on how the work should be done in constructing a bridge. Compensation to be paid for the work was agreed upon subject to the approval of the county court. Thereafter the county court made an order of record that the county would pay or contribute a sum not to exceed five hundred dollars after completion and approval by the county court of such work. Thereafter the presiding judge wrote plaintiff a letter stating the court had made an

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order to pay five hundred dollars when the work was completed and approved by the court, and further stated that if this arrangement was satisfactory with plaintiff that he could proceed with the work. Plaintiff did perform the work and presented his bill for services, which was refused for payment. After quoting the above cited statutory provisions the Supreme Court made the following statement, l.c. 50:

"[1-4] That the evidence wholly fails to show a contract between plaintiff and Reynolds county conforming to the requirements of section 2164 is manifest. Confronted with this situation, appellant places his reliance on section 9507. But before this latter section can avail him, he must show that the work and labor was done, and the material furnished, under a contract with the county. What is the proof of the existence of a contract? The parol evidence must be eliminated. A county court can speak only by its record; and this is true with reference to all its acts, whether judicial or ministerial. Riley v. Pettis County, 96 Mo. 318, 321, 9 S.W. 906, Sanderson v. Pike County, 195 Mo. 598, 604, 93 S.W. 942; Harkreader v. Vernon County, 216 Mo. 696, 706, 116 S.W. 523. The letter written by Judge George is not a record of the county court; it is the merest hearsay. The only competent evidence offered on the issue of contract or no contract was the record entry of an order of the county court. From that order it appears that the county offered to 'contribute not to exceed \$500 after completion and approval of the county court' of 'something * * * to change the flow of water in Black river at the Carter's Mill bridge.' This offer was so vague and indefinite that it could not be made the basis of an enforceable contract. Certainly proof of it does not tend to establish the contract pleaded.

"[5] George's agreement with the plaintiff was not binding upon Reynolds county. He was not an agent of the county 'duly appointed and authorized in writing'; being merely a member of the county court did

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not constitute him an 'agent authorized by law' to make contracts for the county. If all three of the judges of the county court had separately agreed with plaintiff that the county would pay him \$500 for driving piling in Black river, the county would not be bound. They could act for and obligate the county only when sitting as the county court. *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *Board of Commissioners of Cass County v. Ross*, 46 Ind. 404; *McDonald v. Mayor*, 68 N.Y. 23, 23 Am.Rep. 144; *Butler v. City of Charleston*, 7 Gray (73 Mass.) 12.

"[6] The cause of action pleaded in the second count of the petition is on a quantum meruit. The statute, in prescribing the mode by which alone a county can obligate itself by contract, negatives the idea of a promise on its part arising by implication of law. The defendant cannot be held as on an implied contract. *Crutchfield v. Warrensburg*, supra; *Hillside Securities Co. v. Minter*, 300 Mo. 380, 254 S.W. 188."

In the case of *Cook vs. St. Francois County*, 162 S.W. 2d 252, the Supreme Court had before it a situation where St. Francois County had made the following order of record on February 20, 1939, which reads as follows, l.c. 253:

"In the matter of the appointment of Mrs. Blanche Cook, County Health Nurse.

"Now on this day it is ordered by the court that Mrs. Blanche Cook, of Flat River, Mo., be and is, hereby appointed County Health Nurse at a salary of \$200.00, per month from October 1st, to June 1st, and \$150.00, per month from June 1st, to September 1st.

"It is further ordered that appointment to go in effect March 1, 1939."

On March 27, 1939, at the same term of court the county court made of record another order revoking and setting aside the prior order of appointment for reasons stated in said order. Apparently Mrs. Cook was paid her salary for the month of March but was not paid thereafter. She then brought

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this action to recover her salary from April, 1939, until September, 1939, relying upon the agreement she had with the county. In deciding this matter the Supreme Court made the following statement, l.c. 254:

"[2] If appellant's cause of action rests upon a contract of employment, she is barred from recovery by Section 3349, Revised Statutes Missouri 1939, Mo. R.S.A. § 3349, which requires such a contract to be in writing and subscribed by the parties. The county court spread its order upon the record, but appellant filed no written acceptance of the order. On her part the contract, if any, was oral."

In the case of St. Francois County vs. Brookshire, 302 S.W. 2d 1, the defendant had been employed as an attorney to represent the county court in a contempt proceeding brought against the members of the court in the circuit court, and later the defendant represented the members of the court in a habeas corpus proceeding in the court of appeals. The members of the county court orally employed the defendant to represent them. Defendant performed his services and was paid a fee of six hundred dollars by the county for services rendered. About four years later the county brought suit against the defendant to recover the six hundred dollars that had been paid him on the theory the money had been illegally paid for the reason that the services he rendered to the members of the court were services rendered to them as individuals. After holding the county court had no authority to employ defendant as an attorney for the county under the circumstances of this case, the Supreme Court then made the following statement, l.c. 4:

"[6,7] There is an additional reason why the purported employment of defendant in this case by the county was not authorized and the payment of his fee was in violation of law. We deem it advisable to comment upon the matter even though it is not mentioned by either party in the pleadings or briefs. Section 432.070 provides that 'No county, city, * * * or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, * * * and such contract, including the consideration, shall be in writing and dated

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when made, * * *. It is defendant's contention that the arrangement between him and the members of the county court constituted a contract of employment, but there is no contention that this contract, including the consideration, was in writing. The evidence establishes the contrary. The requirements of Section 432.070 that the terms of the contracts therein mentioned be in writing is mandatory and not merely directory, *Donovan v. Kansas City, Missouri*, 352 Mo. 430, 175 S.W. 2d 874[10], 179 S.W. 2d 108, and a verbal contract in violation of this statutory provision is void ab initio and cannot be rendered valid after the services are performed or work done. *Fleshner v. Kansas City, Missouri*, 348 Mo. 978, 156 S.W. 2d 706 [3]; *Likes v. City of Rolla*, 184 Mo. App. 296, 167 S.W. 645 [1]. One dealing with a municipal or county government must take notice of the limitations on the power and authority of the representatives with whom he deals, *Arbyrd Compress Co. v. City of Arbyrd, Mo. App.*, 246 S.W. 2d 104[4], and one of those limitations is the lack of authority to enter into an oral contract. In this case the employment of defendant as attorney for the county was not within the scope of the powers of the county court and was not authorized by law, but even if it had been, the contract of employment would have been void as in violation of Section 432.070.

In *State vs. Miller*, 297 S.W. 2d 611, two of the county judges had already agreed with plaintiff to pay him \$500 for earth moving and construction work for Andrew County, Missouri. This agreement was made when the county court was not in session and no entry of it was made on the records of the county court until several days after the agreement was made and at a time when the court was not in session. Plaintiff performed the work and presented his bill for services, which was approved by two judges, but the presiding judge refused to sign a warrant. This proceeding was in mandamus to compel the presiding judge to sign the warrant. In this proceeding plaintiff contended that the agreement was made by a majority of the county judges and that he, having performed the

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services in good faith, is entitled to recover for his work even though the contract was not executed in the form prescribed by law and was not in writing, relying on the provisions of Section 431.100.

In holding that plaintiff was not entitled to recover, the court stated, l.c. 614:

"[1,2] How do the foregoing facts conform to the requirements prescribed by the law to safeguard the funds of the county? In the first place the law requires such contracts to be in writing. Section 432.070. Absent the required writing, such contracts 'have been held void and performance by the other party ineffectual to create legal liability on the political subdivision on the theory of ratification, estoppel or implied contract [citations].' Elkins-Swyers Office Equipment Co. v. Moniteau County, 357 Mo. 448, 456, 209 S.W. 2d 127, 131. See, also, Carter v. George, 216 MO.App. 308, 264 S.W. 463; Cook v. St. Francois County, 349 Mo. 484, 162 S.W. 2d 252, 254; Missouri-Kansas Chemical Co. v. Christian County, 352 Mo. 1087, 180 S.W. 2d 735, 736. One dealing with the county is deemed to know of such restrictions imposed by law on such transactions. Riley v. City of Rock Port, MO. App., 165 S.W. 2d 880; Hillside Securities Co. v. Minter, 300 Mo. 380, 254 S.W. 188, 193."

The court further states, l.c. 615:

"[5] As to Walton's right to recover under Section 431.100, assuming he performed the work in good faith, it has been held that that section applies only to proceedings 'where the parties have not followed the required form of procedure in executing a contract' with the county and 'affords no relief where the parties have failed to follow the conditions imposed upon the making of a contract'. Missouri-Kansas Chemical Co. v. Christian County, supra. At page 737 of 180 S.W. 2d, the court further said:

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'We have held that this section does not give the claimant a right to recover where he has performed under a contract with a county official if such official is not authorized by law to make the contract'."

Mention should be made of the case of Burger vs. City of Springfield, 323 S.W. 2d 777. In this case the City Council of Springfield, Missouri, by resolution duly enacted and signed by its Mayor, authorized the waterworks committee to employ a suitable person to represent the city in negotiating the purchase of the waterworks, a private company, at a reasonable compensation for services and expenses to be fixed by the City Council upon completion of the services. The Mayor, who was also a member of the waterworks committee, wrote the plaintiff a letter enclosing a copy of the resolution of the City Council and informed him that he had been appointed to represent the city at a reasonable fee, to be determined after the work was completed. Plaintiff by letter accepted the appointment as the negotiator for the city. The plaintiff was able to successfully negotiate the purchase of the water company for several million dollars less than the original asking price. Thereafter the city refused to pay plaintiff for his services and suit was instituted on the contract. In disposing of the case the court stated, l.c. 781:

"It appears, therefore, that the contract sued on in this case was in writing. The resolution in question was pleaded. The resolution is alleged to have been duly adopted by the City Council, approved by the Mayor and duly signed, and a copy was attached to the amended petition. Notification of appointment and acceptance thereof were alleged to have been in writing and copies of the signed letters were attached. The formal execution of the contract was sufficient. Only the sufficiency of the written provision of the documents appear to be in question."
(Emphasis supplied)

The offer of the city was made in writing and it was accepted in writing. The court held this constituted a written contract. The only question was whether the written provisions in the contract that the city would pay "a reasonable compensation" complied with Section 432.070, which required the consideration to be in writing. The court

Honorable Earl R. Blackwell

held the written contract stated the consideration and did comply with this statute. In the instant matter there is no contract in writing between the parties and consequently no consideration is stated.

It is apparent from the cases cited herein that recovery cannot be had under Section 431.100 unless it is founded upon a written contract with a stated consideration and signed by the parties thereto.

It is apparent from the cases cited herein that liability on the county can be created only by a written contract under Section 431.100, supra, or under Section 432.070, supra, and that Section 431.100 applies only when the parties have executed a written contract but may not have followed the required formal procedure leading up to the execution of a written contract. We also believe that the above cited cases are authority for holding that the written contract must state the consideration and be subscribed by the parties thereto and entered upon the records of the county court.

Under the facts submitted in the present matter there was no contract in writing subscribed by the parties thereto and entered upon the records of the county court. The one-sentence entry made by the county court on the court records does not constitute a written contract as required by statute.

CONCLUSION

It is our opinion that under the facts submitted herein the agreement made by the county court with the county clerk as stated herein does not create a valid legal obligation on Jefferson County due to the fact that it was not in writing with the consideration stated therein and was not subscribed by the parties and entered on the records of the county court as required by the law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

MM:BJ

THOMAS F. EAGLETON
Attorney General

CORPORATIONS:
NON-VOTING COMMON STOCK:
CONSTITUTIONAL LAW:
CONSTRUCTION OF CONSTITUTION:

A Missouri Corporation under or subject to the General and Business Corporation Law may validly issue a class of non-voting common stock. The issuance of such non-voting common stock is not in violation of Article XI, Section 6 of the Constitution or of any statutory provision.

March 18⁷, 1962

Honorable Warren E. Hearnese
Secretary of State
State Capitol
Jefferson City, Missouri

FILED
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Dear Mr. Hearnese:

You have requested the opinion of this office with respect to the validity of Non-voting Common Stock in Missouri, as follows:

"This Department has recently received Articles of Amendment of Wren Electric, Inc., a Missouri Corporation wherein said Articles purport to create two types of Common Stock, one being Class A without voting rights and the other being Class B with voting rights. The original of said Articles of Amendment is attached for your inspection.

The problem involved, as this Department sees it, is; Is non-voting Common Stock permissible under Article XI, Section VI of the Constitution of Missouri, 1945 and Chapter 351, Revised Statutes of Missouri, 1959.

We are also enclosing a memorandum in reference to the above question presented to this office in conjunction with the proposed amendment.

Also in conjunction with this request, this writer feels he should advise you that the

Honorable Warren E. Hearnes

files of this office presently reflect that there are an excess of six hundred Missouri domestic corporations now in good standing that have authorized the above type of stock in question, the same being approved by this office from the years 1923 to date."

The Articles of Amendment of Wren Electric, Inc. submitted with your request disclose that the holders of all of the issued and outstanding capital stock of the corporation voted in favor of dividing the stock into two classes, Class A common shares and Class B common shares, each with a par value of \$1.00 per share. The proposed amendment provides as follows with respect to voting rights:

"The holders of Class 'A' common shares shall not, except as otherwise specifically provided herein, have any voting right as shareholders of the Corporation, nor shall they be notified of the meetings of the shareholders. All rights to vote and all voting power (including but not limited to the right to vote for directors and managers), and all management and control of the Corporation, except as otherwise hereinafter specifically provided, are vested exclusively in the holders of Class 'B' common shares."

"The holders of Class 'A' common shares shall only have the right to vote on any amendment to the Articles of Incorporation of said Corporation which would change the relative rights as fixed in this amendment between Class 'A' common shares and Class 'B' common shares. The holders of said Class 'A' common shares and Class 'B' common shares shall each vote as a class."

The issue thus presented is whether stockholders by unanimous agreement, either in the original Articles of Incorporation or by Articles of Amendment, may validly restrict the voting power of one class of common stock so that all right to vote and all voting power, including, but not limited to, the right to vote for directors and managers, is vested exclusively in the holders of the other class of common stock. It is noted that the Articles of Amendment do not attempt to deprive the holders of the non-voting stock of the right to vote on any amendment which would change the relative rights as between the two classes of stock.

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The question for resolution is twofold in nature:

(1) Is such Non-voting Common stock valid in view of Section 6, Article XI of the Constitution of Missouri? (2) Is such Non-voting Common Stock valid under the applicable provisions of the corporation code of Missouri? We will discuss these questions in order.

The relevant constitutional provision (Section 6, Article XI of the Constitution of Missouri, 1945) reads as follows:

"In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected, and may cast the whole number of votes, either in person or by proxy for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner; provided, that this section shall not apply to co-operative associations, societies or exchanges organized under the law."

Except for the proviso relating to cooperatives, the identical constitutional provision, with slight and immaterial changes in phraseology, appeared in the 1875 Constitution as Section 6, Article XII. For purposes of comparison we quote the 1875 section as follows:

"In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company. multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner."

Both of the foregoing constitutional provisions are limited to elections for directors or managers and have no application to voting rights with respect to any other matters. The 1875 Section

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was construed by our Supreme Court in 1905 in the case of State ex rel Frank v. Swanger, 190 Mo. 561, 89 SW 872. That was an action in mandamus to compel the then Secretary of State to issue a certificate of incorporation. His refusal was based upon a provision in the Articles of Incorporation which vested the voting power exclusively in the common stock and contained the express statement that the preferred stock shall have no voting power. The Supreme Court en banc ordered the peremptory writ to issue. For over fifty years the interpretation given to the constitutional provision by the Swanger case has not been challenged in any appellate court of Missouri. And, significantly, the 1945 Constitution made no change in substance in the provision other than to exclude its application to cooperatives. What then was the interpretation placed upon Section 6 by the Supreme Court?

It is true that the Swanger case involved only preferred stock. However, the interpretation given to Section 6 can not, in our view, be limited to preferred stock as such, but on the contrary, the interpretation applies generally to all stock and to the voting rights of all stockholders. The precise point for decision in the Swanger case was whether Section 6 meant that each shareholder shall have the right to vote for directors or managers and in connection with such guaranteed right have the right of cumulative voting and the right to vote by proxy, or whether the provision pertained only to cumulative voting and the right to vote by proxy.

If each shareholder was guaranteed the right to vote in all events, then obviously this Section would apply to preferred stock as well as common stock. The Court conceded that if the Constitutional provision were given a literal construction there would be much force to the argument that it contained a guarantee to all stockholders of the right to vote. However, the Court reached the conclusion that the literal construction was not the proper one, basing its conclusion on what it held was "the obvious purpose" of inserting the section into our fundamental law. The interpretation given by the Court in the Swanger case appears in the opinion as follows (89 SW 1.c. 876):

" * * *Its purpose was to introduce the principle of cumulative system of voting

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in elections of stockholders so as to secure the minority of stockholders a voice in the management of the affairs of the company in proportion to the number of his shares, in lieu of the common-law right to vote one vote, irrespective of the number of shares held by him.* * *

Again, and to amplify and make more specific the foregoing interpretation, the Court stated (89 SW 1.c. 876):

"* * * Properly understood, we think section 6, art. 12, of the Constitution means only that every stockholder entitled to vote at any corporate election is entitled to vote his share on the cumulative plan, but does not mean that the stockholders themselves in the organization of the company may not voluntarily agree that certain preferred stock shall be issued and that the holders thereof shall not have the right to vote. * * *

Finally, and again emphasizing the restrictive interpretation placed by the Court upon Section 6, it was said (89 SW 1.c. 877):

"* * * We hold, then, that the evident purpose of section 6, art. 12, of our Constitution was the guaranty to stockholders having the right to vote of cumulating their votes, and has no reference to the contractual right of the stockholders inter sese of providing that preferred stockholders shall or shall not have the right to vote such stock, and to hold that it has taken away this well-recognized common-law right would be to distort its obvious purpose."

As thus construed by the Court, the "obvious purpose", the "evident purpose", of Section 6 was to guarantee to every stockholder "entitled to vote" or "having the right to vote", for corporate managers, the right to vote his share "on the cumulative plan". Such being the "evident purpose" of the constitutional provision, the inquiry, therefore, is not whether the stock in question is preferred or common, but whether by agreement consistent with applicable statutes the holder of such stock is "entitled to vote". If the stock held by the shareholder is of a kind which entitles him to vote then, as construed in the

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Swanger case, the constitutional provision guarantees him the right of cumulating such vote and to vote by proxy. If the stock has no voting rights, then the constitutional provision simply has no application. In this connection, the comment of the Court in the Swanger case (89 SW 1.c. 876) is pertinent:

"* * *We can discover no intention to take away a long-established right of stockholders at common law to make their own agreements, as long as they did not collide with some settled principle of law, organic or statutory, and which did not contravene public policy, but concerned themselves only. * * *"

As we have pointed out, it is true that the Swanger case involved only preferred stock. It is also true that the Court discussed the reasonableness of charter provisions denying preferred stock the right to vote. And it is true that the Court ruled that by the constitutional provision in question, the people did not intend to change the "long established right of stockholders to make certain stock a preferred lien on the dividends of a business, and to agree that the holders of such stock should have no right to vote in the management of the business, but should content themselves with the preferences and priorities given them of first receiving the profits of the business." But as we read the case, all such statements and arguments are but reasons which demonstrate that the constitutional provision was not in fact intended to guarantee to any shareholder the right to vote in cases where the stockholders validly agreed otherwise.

The interpretation given the constitutional provision in Swanger, namely, that it merely guarantees the right of cumulative voting to each shareholder entitled to vote, necessarily eliminated any conceivable constitutional right to vote per se, and of itself operated to confine the language of section 6 to the right of cumulative voting. Any other conclusion would result in holding that the constitutional provision, in addition to guaranteeing the right of cumulative voting in person or by proxy, was also intended to guarantee the right to vote to some but not all classes of shareholders, in spite of the express use of the words "each shareholder." In the light of the Swanger ruling we do not believe that the constitutional provision is subject to the interpretation that it means that "each common shareholder and each preferred shareholder entitled to vote shall have the right to vote on the cumulative plan". In our view, Section 6 either guarantees to all stockholders, without regard to the nature of their stock,

the right to vote for directors in addition to the right to vote on the cumulative principle or it simply guarantees the right to vote on the cumulative plan to those shareholders otherwise having the right to vote in accordance with the terms under which that stock was issued or acquired.

Even if it be accepted that the framers of the 1875 Constitution assumed that each shareholder had the basic right to vote, this would not mean that the provision was intended to guarantee in all instances such right to vote if the shareholders (in their Articles of Incorporation) entered into an agreement otherwise. Such was not the purpose of the constitutional provision, as the Swanger case ruled, and it is the purpose thereof which controls the construction to be given thereto.

Our attention has been directed to certain general principles to the effect that at common law the right to vote follows the ownership of stock. However, this rule means only that such right prevails in the absence of any common restriction upon a particular class of stock. See to this effect 2 Thompson on Corporations (3rd Ed) Section 949 and 5 Fletcher Encyclopedia Corporations (Perm. Ed) Section 2026. In the Swanger case, the Court quoted from Miller v. Ratterman, 47 Ohio St. 141, 24 N.E. 496 as follows: "It is true that one characteristic of stock generally is that it can be voted upon. But this is not essential." As Thompson, above cited, points out, the legality of a restriction upon the voting rights of preferred stock "is not based on the theory that preferred stockholders are guaranteed a dividend; but rather on the inherent power of the corporation to restrict the voting power. It is simply a contract relation between two classes of stockholders, in which the public has no concern." And in Clark and Marshall, Private Corporations, Vol. 3 pp. 1996-1997 it is said: "A stockholder has no right to vote at corporate meetings, whether the stock is common or preferred, if it is so stipulated when the stock is issued, for the stipulation is then a term of his contract."

There are respectable authorities in other jurisdictions, as well as learned articles in law reviews, which are critical of the Swanger decision and the basic premise upon which it was ruled. If the question were for decision de novo a strong argument could be made against the validity of any class of non-voting stock, at least insofar as relates to the election of corporate managers. However, whether Swanger was ruled rightly or wrongly, or whether the court would have reached the same result today, having had the benefit of other cases and the comments in law review articles, is beside the point.

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The Swanger case has authoritatively construed Section 6 as it appeared in the 1875 Constitution. The framers of the 1945 Constitution having re-enacted the constitutional provision without change are presumed to have adopted the construction given to such section by our Supreme Court in the Swanger case.

It is well settled that where a Court of last resort has construed a statute and such statute is re-enacted or continued in force without any change in its terms, the presumption is that the construction theretofore given to the statute is adopted by the lawmakers. There are many cases to this effect. See Handlin v. Morgan County, 57 Mo. 114, 116; State ex rel Steed v. Nolte, 345 Mo. 1103, 138 SW2d 1016, 1019; Messick v. Grainger, 356 Mo. 1227, 205 SW2d 739; and State ex inf. Gentry v. Meeker, 317 Mo. 719, 296 SW 411, 413. The constitution, of course, as the fundamental law of the state, is subject to the same rules of construction as are other laws. See Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 10 SW 595, 597; State ex rel Jones v. Atterbury, Mo. Sup., 300 SW2d 806, 810; Brown v. Morris, 365 Mo. 946, 290 SW2d 160, 167. In Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 SW 196, 199, it was held:

"The rule is firmly settled that the adoption in a later Constitution of the words and context of another, which had been construed by a court of last resort, is presumed (in the absence of a contrary intention) to have been done to give the adopted words their adjudicated meaning."

To the same effect are State ex rel Board of Control v. St. Louis, 216 Mo. 47, 115 SW 534, 547; and Moore v. Brown, 350 Mo. 256, 165 SW2d 657.

The rule that the construction given a constitutional provision by our highest court becomes a part of the provision itself, is particularly applicable in situations of this kind where the entire subject is open to the constitutional convention for close study, redrafting, and the making of any changes deemed desirable. The only change in substance made in Section 6 was the addition of the provision excluding cooperatives from the operation thereof. No attempt was made to qualify, limit or overrule the Swanger decision by specifically guaranteeing the right to vote either to all stockholders or to any particular class thereof.

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In our opinion, therefore, Section 6, Article XI of the 1945 Constitution guarantees only to stockholders having the right to vote, the right to vote on the cumulative plan in person or by proxy. Nothing contained in the said section prohibits the issuance of any class of non-voting stock. In our view, the constitutional provision may not fairly be construed to prevent the issuance of any class of shares containing restrictions or limitations on the right to vote. The intention is simply to guarantee to a stockholder, with respect to voting rights acquired by him in the issuance or purchase of stock, the right of cumulative voting in person or by proxy, rather than to deny the right to freely contract with respect to the right to vote at all.

Although no mention thereof is made in the Swanger opinion, we believe it significant that Section 6 contains the provision that directors or managers shall not be elected "in any other manner", language which in our view relates to a guarantee of the method of voting rather than to the right to vote, per se.

The unsettling effect of a ruling adverse to the validity of non-voting common stock should not be overlooked. We have been informed that hundreds of corporations in good standing presently have provisions in their articles of incorporation providing for classes of non-voting common stock. Some of such corporations were organized prior to the adoption of the 1945 Constitution. Consistently, since the Swanger decision, every administrative officer concerned with the issuance of corporate charters and certificates of amendment thereto, has construed the Swanger decision and the fundamental law upon which that case was grounded, as authorizing the issuance of classes of non-voting common stock. It is to be assumed that the framers of the 1945 Constitution were aware of this practical construction given to the language of Section 6 and the interpretation of the Swanger case by such administrative officers as well as by the lawyers who assisted in the organization of such corporations. It is also to be assumed that the framers of the Constitution were aware of the provisions of the 1943 corporation code which, in our view, contains a legislative construction of the Constitution in accord with our construction of the Swanger ruling.

We are aware of no fundamental policy of this State which would be violated by continuing to construe Section 6 of Article XI as it has heretofore been construed and which construction is fully in accord with the interpretation of the language thereof as expressed in the Swanger decision. We rule and hold, therefore,

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that the Constitution of Missouri does not prohibit or invalidate the issuance of non-voting common stock.

We turn next to a consideration of the statutory provisions contained in our corporation code to ascertain whether a class of non-voting common stock is permissible thereunder.

We do not reach the question of whether stockholders may validly agree in their charter to limit, restrict, or prohibit the exercise of voting rights by any class of stock absent specific statutory authorization. In our view, our statutes properly construed authorize the issuance of non-voting common stock.

Section 351.180 RSMo 1959, provides in part as follows:

"1. Each corporation shall have power to create and issue the number of shares stated in its articles of incorporation. Such shares may be divided into one or more classes, any or all of which classes may consist of shares with par value or shares without par value, with such designations, preferences, qualifications, limitations, restrictions, and such special or relative rights including the right of conversion into any other class of shares as shall be stated in the articles of incorporation."

The foregoing section, except for the words "including the right of conversion into any other class of shares" was copied verbatim from the Illinois Business Corporation Act (Smith-Hurd Ill. Annotated Statutes, Chapter 32, Section 157.14.). Significantly, the Illinois section contains the additional sentence immediately following the foregoing, which is omitted in the Missouri statute, as follows, "The Articles of incorporation shall not limit or deny the voting ~~power~~ of the shares of any class." This omission is clearly indicative of an intent to authorize non-voting shares.

Section 351.055, RSMo 1959, provides that the articles of incorporation shall set forth with respect to the shares of stock "a statement of the preferences, qualifications, limitations, restrictions, and the special or relative rights including convertible rights, if any, in respect of the shares of each class."

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Section 351.085, RSMo 1959, provides with respect to amendments of articles of incorporation that such amendments may be made "to change the preferences, qualifications, limitations, restrictions and special or relative rights including convertible rights in respect of all or any part of its shares, whether issued or unissued." Said section further permits the amendment of articles of incorporation "to create a new class or classes of stock and to define the preferences, qualifications, limitations, restrictions, and the special or relative rights of the shares of such new class or classes."

Section 351.245, RSMo 1959, provides in part:

"1. Each outstanding share entitled to vote under the provisions of the articles of incorporation shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders."

The comparable provision of the Illinois Business Corporation Act (Section 157.28, Smith-Hurd) reads: "Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders." It should also be noted that paragraph 3 of Section 351.245 provides that with respect to voting for directors the principle of cumulative voting is guaranteed but only to "voting shares."

It is also of significance that Section 351.090, RSMo 1959, prescribing the manner of making amendments to articles of incorporation, provides that at the meeting of shareholders "a vote of the shareholders entitled to vote thereat shall be taken on the proposed amendment." The statute then provides that said amendment shall be adopted upon receiving the affirmative vote of a majority of the outstanding shares "entitled to vote". However, the following provision is then included which extends the right to vote to any other class of stock which is adversely affected by the proposed amendment. The statutory language, paragraph 1 (3)(a) of Section 351.090 is as follows:

"(3)(a) That if any amendment provides for the creation or increase of preferential shares, then such amendment shall be adopted only upon receiving, in addition to the affirmative vote of the majority of all other outstanding shares entitled to vote, the following vote of each other class of shares, voting as a separate class, whether by the terms of the articles of incorporation such class be entitled to vote or not, over which such new or additional preferential shares

Honorable Warren E. Hearnes

would have a priority or with which such new or additional preferential shares would participate: . ."

The foregoing statutory provision can only mean that even if there are no preferential shares then in existence, any other class of shares which may have no right to vote by the terms of the articles of incorporation shall nevertheless be entitled to vote as a class on the kind of proposition described in the foregoing quoted portion of the statute. This would clearly indicate that the Legislature contemplated a class of non-voting common stock, even if none of the other provisions of the statute above cited are taken into consideration.

In our view, the power of a corporation to issue different classes of shares and to provide for "preferences, qualifications, limitations, restrictions, and special or relative rights in respect of the shares of each class" clearly authorizes the creation of a class of common shares having no voting rights except to the extent required by the foregoing provisions of Section 351.090. The restriction with respect to voting is clearly comprehended within the "restrictions", "limitations", and "relative rights" which are authorized to be made in respect of any class of shares.

We find no language in the corporation code indicative of a legislative intent to prohibit the creation of a class of non-voting common stock or to permit restrictions upon voting rights to be made only with respect to preferred shares. We rule and hold, therefore, that the creation and issuance of non-voting common stock is permissible under our statutes and that such shares may validly be issued. It follows from the foregoing that the certificate of amendment to the articles of incorporation of Wren Electric Inc. conform to law, and that it is your duty to file the same upon the payment of the required taxes or fees.

CONCLUSION

It is the opinion of this office that a corporation organized under or subject to the provisions of the General and Business Corporation Law of Missouri may validly issue a class of non-voting common stock and that the issuance of such stock is not in violation of Section 6, Article XI of the Constitution of Missouri 1945 or of any statutory provisions.

Honorable Warren E. Hearnes

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

PUBLIC SCHOOL RETIREMENT SYSTEM:
TEACHERS' RETIREMENT SYSTEM:
CONTRIBUTIONS:
BENEFITS:

Refund or withdrawal of
accumulated contributions
in teachers' Retirement
System are not included in
the term "monetary benefits"
as used in paragraph 9 of
Section 169.070, RSMo,
Cum. Supp. 1961.

(Opin. No. 389 ('61)
" 28 ('62)

March 30, 1962

Mr. G. L. Donahoe
Executive Secretary
Public School Retirement System of Missouri
Room 801, Jefferson Building
Jefferson City, Missouri

FILED
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Dear Mr. Donahoe:

This is in reply to your letter of October 23, 1961, in which you requested an opinion of this office. The questions you propound are stated in the last paragraph of your letter, as follows:

"We need to know whether the payments provided for in subsections 3, 4, and 5 of Section 169.070 are to be considered as 'monetary benefits'. If the payments are to be considered as 'monetary benefits', are we to pay only two-thirds of the amount provided for in subsection 3, 4 or 5 if a member has elected to pay a retroactive contribution? If a member has not elected to pay a retroactive contribution, will we make two calculations; i.e., one because of the contributions and interest resulting from services prior to July 1, 1961, for which we make payment in full, and another because of the contributions and interest resulting from services after July 1, 1961, and for which we pay two-thirds of the amount provided for in subsection 3, 4 or 5?"

The essence of your question is the meaning of the word "benefits" and the phrase "monetary benefits" contained in

paragraph 9 of Section 169.070, RSMo, Cum. Supp. 1961, and whether the word or phrase includes the refunding of accumulated contributions in accordance with paragraphs 3, 4 and 5 of that section.

Paragraphs 3, 4 and 5 of Section 169.070, RSMo 1959, read as follows:

"3. If the total of the retirement allowances paid to an individual before his death is less than his accumulated contributions at the time of his retirement, the difference shall be paid to his beneficiary, or to his estate, if there be no beneficiary, provided however, that no such payment shall be made if one of the options in subsection 1 of this section has been elected.

"4. If a member dies before receiving a retirement allowance, his accumulated contributions at the time of his death shall be paid to his beneficiary or to his estate, if there be no beneficiary, provided however that no such payment shall be made if the beneficiary elects option 1 in subsection 1 of this section.

"5. If a member ceases to be a public school employee as herein defined and certifies to the board of trustees that such cessation is permanent, or if his membership is otherwise terminated, he shall be paid his accumulated contributions with interest if he has contributed for more than five years, or if he has contributed for less than five years and such termination occurs after he has attained age sixty-five with less than five years of creditable service. If he has contributed for not more than five years and his termination occurs before he has attained age sixty-five,

he shall be paid the amount he has contributed without interest."

The question presented then is whether the payments provided for in these three paragraphs are included in the term "monetary benefits" as that term is used in paragraph 9 of Section 169.070, RSMo, Cum. Supp. 1961. In order to determine that question, we direct our attention to that paragraph, and in order to fully understand that particular paragraph we should first trace its history. Paragraph 9 of Section 169.070, RSMo 1959, was amended by the 71st General Assembly, and the present law became effective on October 13, 1961. The present law with which we are concerned now reads as follows:

"9. Notwithstanding anything in this law to the contrary, from the effective date of this law, the contribution rate under this law shall be multiplied by the factor of two-thirds for any member of the system for whom Federal Old Age and Survivors Insurance tax is paid from state or local tax funds on account of his employment entitling him to membership in the system. The monetary benefits under this law for such a member shall be multiplied by the factor of two-thirds if the member elects within one year after this law becomes effective to pay into the system a retroactive contribution of four per cent on that part of his annual salary rate which was in excess of four thousand eight hundred dollars but not in excess of eight thousand four hundred dollars for each year of employment in a position covered by the system between July 1, 1957 and July 1, 1961. The retroactive payment shall be made by the member paying to the system over a period of not longer than four years from the date of election provided however, that if a member is retired prior to completing such payments the balance due shall be deducted from his retirement allowance. The monetary benefits under

this law for a member not electing to make retroactive payments shall be the sum of

"(1) The benefits provided in this section, as it appears in RSMo 1959, for years of creditable service prior to July 1, 1961; and

"(2) Two-thirds of the monetary benefits under this law for years of creditable service after July 1, 1961. If there is a discontinuance or termination of the payment of Federal Old Age and Survivors Insurance tax from state or local funds the provisions of sections 169.010 to 169.130, RSMo, shall be in full force and effect for such a member."

Prior to this new enactment, this particular paragraph of this section as it appeared in the 1959 Revised Statutes was as follows:

"9. Notwithstanding anything in this law to the contrary, the contribution rate fixed by the board of trustees prior to the effective date of this law and all other conditions with respect to contributions, salary upon which contributions are made, and benefits as provided by law prior to the effective date of this law shall be in force for any member of the system for whom federal old age and survivors' insurance tax is paid from state or local tax funds on account of his employment entitling him to membership in the system, provided that if there is a discontinuance or termination of the payment of federal old age and survivors' insurance tax from state or local tax funds for such member, the provisions of this law relative to contribution rate, salary upon which

contributions are made and benefits for services thereafter shall be in full force and effect as of the date of discontinuance of such payment."

This paragraph 9 of Section 169.070, RSMo 1959, was a new paragraph which was added by amendment in 1957 (Laws of 1957, page 432).

The primary rule in the construction of statutes is set out in *A. P. Green Fire Brick Company v. Missouri State Tax Commission*, Mo. Sup., 277 SW2d 544, 1.c. 545, as follows:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration." *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W.2d 920, 925."

In determining the meaning of the word "benefits" and the phrase "monetary benefits" as used in paragraph 9 of Section 169.070, we first refer to the definitions contained in Section 169.010 and see that neither the word nor the phrase are defined in that section. In fact, the phrase "monetary benefits" can be found in no other section of the law governing the Public School Retirement System of Missouri. We are unable to see any distinction between the word "benefits" and the phrase "monetary benefits", and for the purposes of this opinion we will treat them as synonymous. In other words, we will consider "monetary benefits" to be the same as "benefits".

Although the word "benefits" is not defined in Section 169.010, the word appears in many other sections of the law governing the Public School Retirement System of Missouri. As used, the word appears to be a generic term applying variously to retirement allowances, disability allowances, survivors' death benefits, or other special benefits. Nowhere in this law is the word "benefits" given any technical meaning. In paragraph 9 of Section 169.070, RSMo, Cum. Supp. 1961, the term "monetary benefits" is used in reference to

two separate categories. The first category applies to the members specified in that subsection who elect to make a retroactive contribution, and for such members the monetary benefits under the System shall be multiplied by the factor of two-thirds. The second category applies to members who do not elect to make the retroactive contributions to the System, and for such members the monetary benefits under the System are declared to be the sum of (1) "The benefits *** for years of creditable service prior to July 1, 1961", and (2) "Two-thirds of the monetary benefits *** for years of creditable service after July 1, 1961. ***". In this second category, the benefits or monetary benefits referred to are only those benefits "for years of creditable service". A refund, return or withdrawal of accumulated contributions under paragraphs 3, 4 or 5 of Section 169.070 is not in any way connected to "years of creditable service". Therefore, a refund, return or withdrawal of contributions is not included in the term "benefits or monetary benefits" as it applies to the second category. We are of the opinion that the monetary benefits referred to under the first category are the same as those referred to in the second category, and therefore, under this interpretation, the benefits or monetary benefits referred to in paragraph 9 of Section 169.070 do not include a refund, return or withdrawal of accumulated contributions under paragraphs 3, 4 or 5 of that section.

This interpretation is logical and gives a plain and rational meaning to the law in question. A contrary interpretation would not be in conformity with the manifest purpose of the law and would produce the incongruous result of permitting those members within the purview of paragraph 9 to withdraw only two-thirds of their accumulated contributions while all other members of the system could withdraw all of their accumulated contributions.

This interpretation and conclusion are supported by the decision regarding benefits and withdrawal of contributions in the case of *State ex rel. State Employees' Retirement Board v. Yelle*, 195 P. 2d 646, 648, 31 Wash. 2d 87. In that case it was held that the refunding of contributions of a member of the state retirement system who had ceased to be an employee before his retirement was not a "retirement allowance" nor one of the "benefits" to which a retiring

Mr. G. L. Donahoe

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member was entitled under the act setting up the state employees' retirement system.

We therefore conclude that the payments provided for in paragraphs 3, 4, and 5 of Section 169.070 are not considered as "benefits" or "monetary benefits" referred to in paragraph 9 of Section 169.070, RSMo, Cum. Supp. 1961. Since we have concluded that such payments are not benefits, it will be unnecessary to answer the other questions which you have propounded.

CONCLUSION

It is the opinion of this office that the payment of a refund, return or withdrawal of accumulated contributions under paragraphs 3, 4 or 5 of Section 169.070, RSMo, is not included in the word "benefits" or the phrase "monetary benefits" as used in paragraph 9 of Section 169.070, RSMo, Cum. Supp. 1961.

This opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WW:mc

MOTOR VEHICLES: The driver of a truck or bus may not be charged with a crime for violation of either
TRUCKS: Sec. 304.017 or Sec. 304.044.2 when following a vehicle other than another truck or bus.

OPINION NO. 393 (1961) 29 (1962)

March 6, 1962

Honorable William W. Hoertel
Prosecuting Attorney
Phelps County
Rolla, Missouri

FILED
29

Dear Sir:

We are in receipt of your request for an opinion of this office, the relevant portion of which reads as follows:

"This is a formal request for an opinion concerning Sections 304.017, and 304.044, Revised Statutes of Missouri, 1959. It seems that I have run across what appears to be a situation of immunity for a trucker. In Section 304.017, the statute reads that 'a driver of a vehicle other than those designated in Section 304.044, R.S. Mo. shall not follow another vehicle more closely than is reasonably safe and prudent * * *'. (Emphasis mine.) When we look at Section 304.044, (2), it states, 'the driver of any truck or bus, when traveling upon a public highway of this state, outside of a business or residential district, shall not follow within 300 feet of another such vehicle; * * *'. (Emphasis mine.)

"My question, therefore, is this: assuming a motor vehicle in the form of an automobile is driving along a public highway outside of the city limits of any given town or city. Further assuming that the truck is following this automobile, and that the truck is following so close that when the automobile

Honorable William W. Hoertel

gives signal and turns from the road, the automobile is struck in the rear by the truck.

"Under that set of facts, my question is whether or not the truck driver can be charged with a misdemeanor under either Section 304.017 or 304.044, or whether or not, by accident, the legislature has provided an immunity to the truck driver for this type criminal charge."

Sections 304.017 and 304.044.2, RSMo 1959, to which you make reference, are as follows:

§304.017.

"The driver of a vehicle other than those designated in section 304.044 shall not follow another vehicle more closely than is reasonably safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway. Vehicles being driven upon any roadway outside of a business or residence district in a caravan or motorcade, whether or not towing other vehicles, shall be so operated, except in a funeral procession or in a duly authorized parade, so as to allow sufficient space between each such vehicle or combination of vehicles as to enable any other vehicle to overtake or pass such vehicles in safety. This section shall in no manner affect section 304.044 relating to distance between trucks traveling on the highway."

§304.044.2.

"The driver of any truck or bus, when traveling upon a public highway of this state outside of a business or residential district, shall not follow within three hundred feet of another such vehicle; provided, the provisions of this section shall not be construed to prevent the overtaking and passing, by any such truck or bus, of another similar vehicle."

Honorable William W. Hoertel

Violation of either of the quoted sections is made a misdemeanor (§304.026, 304.044.3, RSMo 1959).

From a reading of Section 304.017, it is evident that the drivers of trucks and buses (the subjects of §304.044) are exempted from the requirement of a "reasonably safe and prudent" following distance as provided therein. This is the construction given that section by our Supreme Court in *Thebeau v. Thebeau, Mo.*, 324 SW2d 674, where the Court said (1.c. 678):

"We have no doubt that the main purpose of section 304.044 was, as the Maryland court held, to provide sufficient space between trucks and busses to permit lighter vehicles to pass, but we are not persuaded that this was its only purpose. We think it obvious that as a traffic safety regulation it was also intended for the protection of forward trucks and those trucks following, as well as the drivers and passengers therein. It should be noted that, unlike the Maryland and other similar statutes in the cases we have mentioned, our section 304.017 (providing that the driver of a vehicle shall not follow another vehicle more closely than is reasonably safe and prudent) by its express terms is inapplicable to the drivers designated in section 304.044. Note the language with which section 304.017 opens and closes: 'The driver of a vehicle other than those designated in section 304.044, RSMo, shall not follow,' etc. 'This section shall in no manner affect section 304.044, RSMo, relating to distance between trucks traveling on the highway.' (Italics, the present writer's.) Therefore, if the safe and prudent following distance rule is applicable to drivers designated in section 304.044, it is by virtue of a common law duty, and not under section 304.017."

Turning now to Section 304.044.2, it is there provided that no truck or bus shall follow within three hundred feet of "another such vehicle." The statute contains a proviso permitting a truck or bus to pass "another similar vehicle."

Honorable William W. Hoertel

It appears, therefore, that the driver of a truck or bus is limited by the three hundred feet following distance only when he is following another truck or bus. The following distance requirement of Section 304.044.2 does not have application, then, to the situation where a truck or bus is following an automobile.

Since the driver of a truck or bus following a vehicle other than another truck or bus is exempted from the following distance requirements of both Section 304.017 and Section 304.044.2, he may not be charged with a crime for the violation of either of these statutes under the facts which you set out.

CONCLUSION

It is, therefore, our conclusion that the driver of a truck or bus may not be charged with a crime for the violation of either Section 304.017 or Section 304.044.2 when following a vehicle other than another truck or bus.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

COLLECTOR OF REVENUE:
COUNTIES:
COUNTY OFFICES:

Requirement that county provide facilities and items enumerated in Section 49.510 should prevail over requirement of Section 52.270 that collectors in counties included in classification of Section 52.260(14) should pay expenses of his office and other costs of collecting the revenue, as to items and facilities enumerated in 49.510.

January 19, 1962

FILED
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Honorable W. T. Scott, Supervisor
County Department
Department of Revenue
Jefferson City, Missouri

Dear Mr. Scott:

Your recent request for an opinion of this office reads as follows:

"Our department respectfully requests an official opinion on the following matter:

"Section 52.270 of Mo. RS states in part as follows:

"The collector of revenue in any county within the classification of subdivision (14) of section 52.260 shall present for allowance proper vouchers for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting the revenue, which shall be allowed as against the commissions collected by him;"

"Our question is, with regard to collectors in counties covered by subdivision (14) of Section 52.260, what specific items should be classified as expenses of his office, and, other costs of collecting the revenue."

The statute you cite was brought into existence by Senate Bill 214 of the 71st General Assembly. The form of Section 52.270 in effect immediately prior to the time when

Honorable W. T. Scott

Senate Bill 214 became law did not include a provision of the same nature as the one you quote, although we find that earlier statutes on this subject did have such provisions. The requirement that the collector "pay all salaries and other costs of collecting the respective revenues" found in Section 52.260 (14), R.S.Mo. 1949, was eliminated by Senate Bill 62 of the 70th General Assembly.

Shortly after Senate Bill 62 of the 70th General Assembly became law, this office issued an opinion at your request on the effect of that bill. In that opinion to you, dated December 30, 1959, it was held that payment of the operating expenses of collector's offices in third class counties within subdivision (14) of Section 52.260 would thenceforward be governed by Section 49.510, which is the general statute relating to payment of expenses of county offices by the county.

Section 49.510, R.S.Mo. 1959, provides as follows:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

The determinative issue herein then is the effect of the new Section 52.270, R.S.Mo. Cum. Supp. 1961, on the application of Section 49.510, R.S.Mo. 1959.

In an opinion issued by this office under date of April 3, 1959, to the Honorable Richard E. Snider, this office held, in effect, that Section 49.510 prevailed over the then existing provision requiring the collector to pay the expenses of his office insofar as rental of office space was concerned. The position taken in that opinion, a copy of which is attached, was that Section 49.510 placed a clear and unambiguous requirement on the county to provide the facilities and supplies enumerated therein, which requirement would obtain in all instances where it was not expressly overruled by another statute.

Honorable W. T. Scott

Consistent with that opinion, we believe that the items and facilities enumerated in Section 49.510 are not "expenses of his office and other costs of collecting the revenue." Hence, your question is answered in negative terms in the sense that the expenses relative to securing the following items and facilities would not be chargeable against the collector's commissions: office space, the maintenance, furnishing and equipping of the collector's office with the necessary stationery, supplies, equipment, appliances and furniture. Section 49.510.

However, as recognized by the last cited opinion, there may be additional expenses which the collector would be obliged to pay. An example of such expenses would be salaries of deputies and clerical hire, as contemplated by Section 52.280, R.S.Mo. 1959.

Without attempting to catalogue every possible type of expenditure which would be included in the phrase "expenses of his office and other costs of collecting the revenue" as used in Section 52.270, R.S.Mo. Cum. Supp. 1961, let it be said that expenditures for items and facilities enumerated in Section 49.510 are not to be so classified, but that other operating expenses not included specifically or by necessary implication in that section would be chargeable against the collector's commissions.

CONCLUSION

Therefore, it is the opinion of this office that the application of the provision in Section 52.270, R.S.Mo. Cum. Supp. 1961, requiring collectors in counties within the classification of Subdivision (14) of Section 52.260 to pay for office expenses and collection costs, should be limited to expenditures other than for the items and facilities to be furnished by the county under Section 49.510. The provision of Section 52.270 in question should be invoked to require payment out of the collector's commission of items such as salaries of deputies and clerks as well as other expenses incidental to the performance of the collector's function and not otherwise provided for.

This opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Yours very truly,

AJS:BJ

THOMAS F. EAGLETON
Attorney General

SALARIES AND FEE:
MAGISTRATE FEE:
MAGISTRATE COURT FEE:
FIRST CLASS COUNTIES:
WHEN COLLECTABLE:

1. Sec. 66.110, RSMo 1959, providing for a fee of two dollars and fifty cents in each case involving violation of a county ordinance, is applicable to St. Louis County magistrate courts. Said fee shall be collected in each county ordinance case instituted in any magistrate court of such county. 2. Sec.

483.610, RSMo 1959, providing for collection of five dollar magistrate court fee in each criminal proceeding and in each preliminary hearing instituted in any magistrate court, is applicable to St. Louis County magistrate courts. Said fee shall be collected only in each criminal case instituted in a magistrate court of said county. 3. Sec. 482.250 RSMo Cum. Supp. 1961, applies in cases other than criminal proceedings and cases involving county ordinances. The fee provided for in the section is collected by magistrate courts of St. Louis County only in such cases.

April 4, 1962



Honorable Norman H. Anderson
Prosecuting Attorney of
St. Louis County
Court House
Clayton, Missouri

OPINION NO. 31(62) 398 (61)

Dear Mr. Anderson:

This office is in receipt of your request for a legal opinion, which reads as follows:

"This office has been requested by the various Magistrates in St. Louis County to seek an opinion from your office relating to the following: under Section 482.250 of the Revised Statutes of Missouri which became effective this year, there is contained therein a statement as follows: 'for such Courts the Magistrate fee shall be \$6.00.'

There is nothing in the above section which negates or voids any of the other sections of the statutes dealing with various fees to be charged in the Magistrate Courts, such sections setting out specific fees for State criminal cases and County cases. As the Magistrates are all concerned as to the fees they should be charging at the present time, your prompt

opinion on this matter would be greatly appreciated by all."

Section 482.250, RSMo Cum. Supp. 1961, provides as follows:

"The salaries of magistrates and clerks of the magistrate court, lying wholly within any city of more than six hundred thousand inhabitants or any county of the first class, shall be fixed and paid as provided by general law for other magistrates and clerks, except that the annual salary of each magistrate shall be nine thousand eight hundred dollars. For such courts the magistrate fee shall be six dollars."

St. Louis County is one of the first-class and has adopted its own county charter, under provisions of Section 18, Article VI, Constitution of Missouri.

We understand the "County Cases" referred to in the opinion request are prosecutions for violation of St. Louis County ordinances, authorized by Chapter 66, RSMo 1959, and particularly Section 66.010, of said Chapter, providing such cases may be prosecuted in magistrate courts. The section reads as follows:

"Any county of class one framing and adopting a charter for its own government under the provisions of section 18, article VI of the constitution of this State, may prosecute and punish violations of its county ordinances in the magistrate courts of such counties in the manner and to the extent herein provided."

Section 66.110 provides what fee shall be allowed and collected in county ordinance violation cases, and reads as follows:

"In each such proceeding had before a magistrate court involving a violation

of a county ordinance a fee of two dollars and fifty cents shall be allowed and collected to be in full for the service of the magistrate or the clerk of the magistrate court. All such fees charged and collected by the clerk of the magistrate court shall be paid over to him at the end of each month to the director of revenue as provided in section 483.615, RSMo."

Section 66.110, supra, is a special, as distinguished from a general statute, for the reason it applies only to the magistrate courts of first class counties with charter forms of government. It requires the allowance and collection of a fee of two dollars and fifty cents in each county ordinance case, which is a special proceeding, and does not authorize the allowance and collection of a fee in this amount in any other proceeding in the magistrate courts of such counties.

Section 482.250, supra, is a general statute applicable to magistrate courts of cities of more than six hundred thousand inhabitants and magistrate courts of all counties of the first class. When Section 66.110 is compared with Section 482.250, it appears that the former is a special statute while the latter is general, as it is fully applicable to magistrate courts of all first class counties, including those of St. Louis County. Therefore, in cases violating prosecutions in magistrate courts in St. Louis County for violation of county ordinances a fee of two dollars and fifty cents is allowed and collected for the services of the magistrate or the clerk.

In seeking to determine the kind or class of cases Section 482.250 requires a magistrate fee to be charged for and collected, we find it necessary to refer to and consider other statutes relating to the collection of fees in criminal proceedings in magistrate courts.

Section 483.610, RSMo 1959, provides that certain fees shall be charged for and collected in magistrate courts in criminal proceedings. The only fees mentioned in the section with which we are concerned, are those set out in subsections 2 and 3, which subsections read as follows:

2. "In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of five dollars shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto."

3. "All such fees shall be charged on behalf of the state or county paying salary of such clerk or magistrate and shall be paid and accounted for in the same manner as magistrate fees."

Obviously, the language used in Section 483.610, supra, is sufficiently broad enough to include magistrate courts within first class counties, as subsection 2 provides that in each criminal proceeding and in each preliminary hearing instituted in "any magistrate court, a magistrate court fee of five dollars shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court." It is believed the section refers to every magistrate court, including those of first class counties.

Subsection 2 of section 483.610 refers to a "magistrate court fee", while subsection 3 requires all such fees (including "magistrate court fees" as well as other fees referred to in an earlier part of the section) to be paid and accounted for in the same manner as "magistrate fees", thereby creating a distinction between "magistrate court fees" and "magistrate fees" and that said fees each have a different meaning and the terms cannot be used interchangeably.

In view of the foregoing, it is our thought that Section 483.610, supra, is applicable to the magistrate courts of St. Louis County, and requires a magistrate court fee of five dollars to be allowed, collected and accounted for in each criminal proceeding and each preliminary hearing filed in such magistrate courts.

The magistrate court fee is collectable in each criminal case, and not in a civil case, whereas, a magistrate fee is collectable in a civil case and not in a criminal case.

Therefore, in view of the foregoing, it is believed Section 482.250 applies to cases other than criminal proceedings and cases involving prosecutions for violations of county ordinances and that St. Louis County magistrate courts shall collect the six dollar magistrate fee provided for in such section only in such cases filed in such courts.

Conclusion

Therefore, it is the opinion of this office that:

1. Section 66.110, RSMo 1959, providing for a fee of two dollars and fifty cents in each case involving the violation of a county ordinance is applicable to St. Louis County magistrate courts, and said fee shall be collected in each county ordinance case instituted in any magistrate court of said county.
2. Section 483.610, RSMo 1959, providing for the collection of a five dollar magistrate court fee in each criminal proceeding and in each preliminary hearing instituted in any magistrate court is applicable to the magistrate courts of St. Louis County and said fee shall be collected only in each criminal case instituted in a magistrate court of said county.
3. Section 482.250, RSMo Cum. Supp. 1961, applies in cases other than criminal proceedings and cases involving prosecution for violations of county ordinances and the fee of six dollars provided for in such section is collected by the magistrate courts of St. Louis County only in such cases.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

SAVINGS AND LOAN ASSOCIATIONS:

Savings and loan associations subject to provisions of Chapter 369 RSMo 1959 have no express or implied power to service loan agreements of business corporation which effect the collection of loan contracts which the business corporation was instrumental in effecting between borrower and lender, when such loan contracts at no time become the property of the savings and loan association.

January 18, 1962

Honorable Gordon E. Church, Supervisor
Division of Savings and Loan Supervision
Jefferson Building
Jefferson City, Missouri



Dear Mr. Church:

This opinion is rendered in reply to your inquiry of November 9, 1961, posing a question which we restate in the following language:

May a savings and loan association operating under the provisions of Chapter 369 RSMo 1959, as amended, enter into a contract with a business corporation to assume said corporation's contract servicing agreements which effect the collection of loan contracts which the business corporation was instrumental in effecting between a borrower and lender, such loan contracts at no time becoming the property of the savings and loan association?

Savings and loan associations subject to the provisions of Chapter 369, RSMo 1959, as amended, were formerly known as building and loan associations. We here search for the scope of charter powers of such associations. In the case of Appeal of Powell and Doyle, 93 Mo. App. 296, l.c. 300, such associations are referred to in the following language:

"The defendant is purely a creation of the statute, having only such powers as the statute gives and such as are necessarily implied. But we have not seen any authority which in the least lends countenance to the suggestion, that when a corporation is clothed with certain limited powers, guarded with

Honorable Gordon E. Church

the most explicit directions for the manner of their exercise, that it is in the province of such corporation to depart from such directions in the conduct of its business."

In Endlich On Building Associations, Second Edition, Section 217, we find the subject of powers of these associations treated in the following language:

"But certain powers being specifically granted, all those fairly and necessarily implied in, or incident to the same, follow with the grant, -- as, likewise, do all those essential to the declared object and purpose of the association; not simply convenient, but indispensable. To this extent, and no further, goes the contract implied between the State and the corporation. It lends no legitimacy to the transaction of other business, or the use of corporate powers for objects wholly without the scope and meaning of the charter. The corporation cannot leave its legitimate business in the background, and assume unwarranted functions, without rendering every step upon the unauthorized path illegal and void. Neither the corporation nor its officers can do any act, or make any rule or contract, or incur any liability not authorized either expressly, or by implication from the necessities of its lawful business. All acts beyond the scope of the powers granted, and all powers granted, however explicitly, under a charter based upon a general statute, which are repugnant to such statute, are void, and infect, with that inherent weakness, whatever acts are done by virtue of them."

When a savings and loan association undertakes to service any loan not made by it, or acquired through lawful purchase, it obligates itself to accept deposit payments and act as fiscal agent for persons lawfully entitled to the proceeds of

Honorable Gordon E. Church

such loan. Section 369.395 RSMo 1959 does specifically authorize savings and loan associations to act as fiscal agent for the United States in the following language:

"An association shall have power to act as fiscal agent of the United States, and, when designated for that purpose by the Secretary of the Treasury, may perform under such regulations as he may prescribe all such reasonable duties as fiscal agent as he may require."

The power to act as a fiscal agent expressed in Section 369.395 RSMo 1959, supra, is the only such power we have discovered in Chapter 369 RSMo 1959, as amended. In view of the fact that no investment power, or power to purchase and acquire title to the loans to be serviced, is involved in the question being determined here, it must reasonably be concluded that the power sought to be exercised is neither an express power or an implied power to be exercised by a savings and loan association subject to the provisions of Chapter 369, RSMo 1959, as amended.

CONCLUSION

It is the opinion of this office that a savings and loan association operating under the provisions of Chapter 369 RSMo 1959, as amended, has no express or implied authority to enter into a contract with a business corporation to assume said corporation's servicing agreements which effect the collection of loan contracts which the business corporation was instrumental in effecting between a borrower and lender, when such loan contracts at no time become the property of the savings and loan association.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'M:MS:BJ

June 15, 1962



Mr. John A. Hailey, Executive Secretary
State Board of Registration
for the Healing Arts
Jefferson City, Missouri

Dear Mr. Hailey:

This is in response to your request for advice as to whether persons falling into the following categories may practice medicine in this state without having been licensed by the State Board of Registration for the Healing Arts:

1. Interns in hospitals;
2. Residents in hospitals;
3. Preceptors working under the guidance and supervision of a licensed physician.

In view of the very clear provisions of Section 334.010, we must answer each of the inquiries in the negative. It is of no legal import that a person holds the status of intern, resident, or preceptor: if he is not licensed by the State Board of Registration for the Healing Arts, he may not practice medicine in this state. This and closely related questions were given rather detailed attention in an opinion of this office issued at your request on March 29, 1955. We believe that opinion correctly states the applicable law and attach a copy of it herewith.

We are aware that internship, residency, and preceptorship are traditional teaching tools of the medical profession. The highly competent physicians who practice in this state are living proof of the efficacy of these programs. We have no wish to take the position that such programs need be curtailed in any way and, indeed, do not so hold.

All three of the conditions mentioned above are positions wherein the person concerned learns from practical experience under the supervision of one or more qualified and licensed practitioners. As long as the emphasis remains on the teacher-student relationship rather than on the physician-patient relationship, the resident, intern, or preceptor is not practicing medicine without a license. That is to say that where the student makes his diagnosis and embarks on a course of treatment under the direct guidance and supervision of a duly licensed physician, there is no violation of the licensing law for the student's acts are, in effect, the acts of the teacher. It is only where the student independently undertakes to diagnose or treat that he enters into the practice of medicine which is forbidden to all except those who are admitted to licensure in accordance with the laws of this state.

We have not undertaken herein to approve or disapprove of what the general practice is in hospitals as to the degree of supervision exercised over interns and residents; nor have we considered the standard of supervision as exercised over preceptors. Only the general rule is stated that non-licensed persons may not practice medicine. Residents, interns, and preceptors may participate in diagnosing and treating but only where they act under the immediate supervision and with the consent of a licensed physician.

We sincerely hope that the foregoing will be of assistance to you and to the Board.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

AJS:ms
Enc.

MOTOR VEHICLES:
BICYCLES:
MOTORCYCLES:
DEPT. OF REVENUE:
LICENSES:

A motor-power-assisted bicycle that is capable of propelling itself on horizontal planes but not fully capable of propelling itself on upgrades is a motor vehicle, and this is a question of definition under Section 301.010, rather than classification under Section 301.070, RSMo 1959.

OPINION NO. 422-1961
38 -1962

February 15, 1962

Honorable David A. Bryan, Supervisor
Motor Vehicle Registration
Department of Revenue
Jefferson Building
Jefferson City, Missouri



Dear Mr. Bryan:

This is in reply to your recent request for an opinion from this office in regard to the questions contained in the following letter:

"Frequently we are confronted with questions as to whether or not a motor-power-assisted bicycle that is capable of propelling itself on a horizontal plane but not fully capable of propelling itself on upgrades, is a motor vehicle.

"We respectfully request your opinion on this matter, inasmuch as there is a probability that it is a question of definition under Section 301.010 rather than classification under Section 301.070."

We first determine whether or not the above described motor-power-assisted bicycles are motor vehicles within the meaning of Chapter 301, RSMo 1959. Section 301.010 in part provides:

"As used in chapter 301 and sections 304.010 to 304.040 and 304.120 to 304.570, RSMo, the following terms mean:

* * * *

"(15) 'Motor vehicle', any self-propelled vehicle not operated exclusively upon tracks, except farm tractors;

* * * *

Honorable David A. Bryan

"(28) 'Vehicle', any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on fixed rails or tracks."

Further, Section 301.010 (13), RSMo 1959, defines "motorcycles" as "motor vehicles operated on two wheels".

In your request you state that this is a motor-power-assisted bicycle capable of propelling itself on horizontal planes. Since the bicycle is propelled by a motor it would fall within the definition of "motor vehicle" under Section 301.010 (15) unless the amount of self propulsion removes it from that definition.

In dealing with the problem, we will look to what this office has held in the past in regard to similar mechanical devices on wheels, designed primarily for use on highways. In an opinion under date of September 30, 1941, directed to Captain W. J. Ramsey, this office held that when a bicycle called "Push-A-Bike" is fitted with a gasoline motor, which motor rides on its own tire, that said vehicle when so operated and driven on the highways of this State becomes a motor tricycle or motor vehicle within the meaning of what is now Chapter 301, RSMo 1959, requiring the "Push-A-Bike" to be registered together with a payment of a registration fee, and further that said "Push-A-Bike" comes within the meaning of Motor Vehicle Law, making it an offense for any person under the age of sixteen years to operate a motor vehicle on the highways of this State. A copy of this opinion is enclosed herewith.

In an opinion dated September 7, 1945, to Honorable Hugh Waggoner, Superintendent of the Missouri State Highway Patrol, this office held that a motor scooter is a motor vehicle, that it must be registered and licensed and the Drivers License Law applies to persons operating such. A copy of this opinion is also enclosed herewith.

In an opinion under date of September 10, 1959, to the Honorable Charles H. Sloan, this office held that go-carts are motor vehicles within the Missouri statutes, regulating the licensing and driving of motor vehicles if they are driven upon the highways. Further, that as "motor vehicles", "go-carts" must meet the statutory licensing and equipment regulations for motor vehicles if they are to be driven upon the highways. A copy of this opinion is also enclosed herewith.

Honorable David A. Bryan

All of these mechanical devices are similar to the one at issue. These determinations were made, however, without regard to whether or not these vehicles would have been motor vehicles if they were not fully capable of propelling themselves on indefinite "upgrades", though they were self propelled on horizontal planes.

Section 301.010 (15) defines a "motor vehicle" as "any self-propelled vehicle not operated exclusively upon tracks". The vehicle at issue is not operated on tracks.

"Self-propelled" was defined in Webster's Second International Dictionary as "containing within itself the means for its own propulsion". Webster's Third International Dictionary, Unabridged, defined "self-propelled" as "propelled by its own motor, * * * moved forward by one's or its own force or momentum".

No case has been found defining the word "self-propelled" or where the issue involved a question of whether the vehicle was self-propelled or not.

In regard to construing words and phrases on any statute, Section 1.090, RSMo 1959, states:

"Words and phrases shall be taken in their plain or ordinary and usual sense, * * *"

State of Missouri ex rel Wright v. Carter, 319 S.W. 2d 596, at page 599 states:

"* * * The court should ascertain the legislative intent from the words used if possible and should ascribe to the language used its plain and rational meaning. * * *"

The Supreme Court of Missouri, in State v. Cox, 268 S.W. 87, in construing the Motor Vehicle Law of 1921, which has ultimately become Chapter 301, RSMo 1959, stated at page 90:

"* * * While the above act incidentally, is intended to raise revenue, yet it is essentially a police regulation of the highest type, in which the public welfare was primarily considered in its enactment." (Emphasis supplied)

Honorable David A. Bryan

In State v. Ridinger, 266 S.W. 2d 626, the Supreme Court of Missouri, in interpreting the term "motor vehicle" as defined by Section 303.010, RSMo 1959, stated at page 632:

"[5] 'Motor vehicle' is a generic term. The curious may read of the origin, development, modern acceptance, use and application of the term in 60 C.J.S., Motor Vehicles, §1, p. 109, and in Jernigan v. Hanover Fire Ins. Co., 235 N.C. 334, 69 S.E. 2d 847. It is a matter of common knowledge and every day observation that on the used car and outdoor show and display lots of the State, on lots adjoining garages, and in countless yards and various premises in this State, both rural and urban, stand un-numbered thousands of motor vehicles of every description, many in various conditions of disrepair. But few of them stand ready to operate or could otherwise qualify as 'self-propelled,' but they nonetheless are 'motor vehicles.' Clearly it was not the legislative intent to exclude such motor vehicles from the protection of the 'tampering' statute. If such had been the legislative intention, it would have been simple enough for the law-making body to have added to the statute a proviso in appropriate words to the effect that Section 560.175 was not applicable to motor vehicles not in good running or operating condition or repair and not ready to be driven away."

The Court further stated:

"Manifestly it was the design, mechanism, and construction of the vehicle, and not its temporary condition, that the Legislature had in mind when framing the definition of a motor vehicle. Neither the authorities nor sound logic admit of a different conclusion." * * *

Honorable David A. Bryan

The vehicle at issue is admittedly a mechanical device on wheels, equipped with a motor, designed primarily for use on highways, fully capable of propelling itself on horizontal planes. This type of vehicle can and does cause accidents on highways. This motor-power-assisted bicycle, which has the "design, mechanism and construction" of a motor vehicle, is regulated and is subject to the provisions of Chapter 301, RSMo 1959, as a motor vehicle.

The words "self propelled" should be construed reasonably in its usual and accepted sense. Did the legislature intend the words to mean completely, wholly or fully capable of propelling its self upgrade. Such a meaning would make the definitions of motor vehicles ambiguous and indefinite. If so, what would the degree of "upgrade" be that a vehicle would have to climb in order to be a motor vehicle. Certainly "upgrade" is not defined or made reference to by the statutes involved herein. Further, it is common knowledge that even among the different types of automobiles, which certainly are motor vehicles, there is a wide range of the degree of "upgrade" that the various types of automobiles can effectively climb, thereby making the determination of a standard difficult if not impossible even for legislative purposes.

The Missouri Supreme Court in State v. Mosman, 315 S.W. 2d 209, at page 211 states:

"When called upon to construe a statute, the court's prime duty is to give effect to the legislative intent as expressed in the statute. To this end we are guided by certain well established and recognized rules, among which are the following: (a) The object sought to be obtained and the evil sought to be remedied by the Legislature; (b) the legislative purpose should be assumed to be a reasonable one; (c) laws are presumed to have been passed with a view to the welfare of the community; (d) it was intended to pass an effective law, not an ineffective or insufficient one; * * *" (Emphasis supplied)

The legislature intended to pass statutes with effective and sufficient definitions therein; we conclude that the term

Honorable David A. Bryan

"self-propelled" does not mean wholly or fully self propelled.

From the foregoing, we are of the opinion that the device at issue is a "vehicle" and is a "motor vehicle" subject to the provisions of Chapter 301, RSMo 1959.

In regard to the question proposed in your second paragraph of said letter, as to whether this is a question of definition under Section 301.010, rather than classification under Section 301.070, Section 301.070 in part provides:

"1. In determining fees based on the horsepower of vehicles propelled by internal combustion engines, the horsepower shall be computed and recorded upon the following formula established by the National Automobile Chamber of Commerce: Square the bore of the cylinder in inches multiplied by the number of cylinders, divided by two and one-half."

* * * *

"5. The decision of the director as to the type of motor vehicles and their classification for the purpose of registration and the computation of fees therefor shall be final and conclusive." (Emphasis supplied)

It should be observed that this section refers to and assumes the vehicles described therein are motor vehicles. Under Subsection 5, the Director is authorized for the purpose of registration and computing the license fees to be paid on each particular motor vehicle, to determine its "type" not determine whether a device is a motor vehicle.

Likewise the determination by the director of the "classification" refers to classification of motor vehicles covered by the chapter not the determination of the question of whether or not a particular device is or is not a "motor vehicle". The legislature by its definitions has determined what devices are motor vehicles. The director is charged with the duty of classifying motor vehicles for the purpose of registration and computation of fees. This purpose does not include the duty to decide whether a device is a motor vehicle.

Honorable David A. Bryan

CONCLUSION

It is the opinion of this office that a motor-power-assisted bicycle that is capable of propelling itself on horizontal planes but not fully capable of propelling itself on upgrades is a motor vehicle.

Determination of whether a device is a motor vehicle is a question of definition under Section 301.010 and not a problem of classification for the director under Section 301.070, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul A. Slicer, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PS:BJ

January 3, 1962



Honorable William B. Milfelt
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Milfelt:

We are in receipt of your letter of November 15, 1961, in which you request the opinion of our office regarding the number of deputy sheriffs which Jefferson County should have. Inasmuch as Jefferson County is a second class county we direct your attention to Section 57.220 RSMo 1959, which reads as follows:

"The sheriff, in a county of the second class, shall be entitled to such a number of deputies as the judges of the circuit court shall deem necessary for the prompt and proper discharge of the duties of his office, provided however, such number of deputies appointed by the sheriff shall not be less than one chief deputy sheriff and one additional deputy for each five thousand inhabitants of the county according to the last decennial census. Such deputies shall be appointed by the sheriff, but no appointment shall be come effective until approved by the judges of the circuit court of the county. The judges of the circuit court, by agreement with the sheriff, shall fix the salaries of such deputies. A statement of the number of deputies allowed the sheriff, and their compensation, together with the approval of any appointment by the judges of the circuit court shall be in writing and signed by them and filed by the sheriff with the county court."

Since Jefferson County has a population of 66,377 it should have one chief deputy sheriff and thirteen additional deputies.

Yours truly,

THOMAS F. EAGLETON
Attorney General

BE:ms

OPINION REQUEST
No. 429(1961)
No. 42(1962)
Answered by letter.

March 26, 1962

Honorable David J. Dixon
Prosecuting Attorney
Johnson County
Warrensburg, Missouri



Dear Mr. Dixon:

This refers to your letter of November 20, 1961, and your subsequent discussion with one of my assistants, John G. Baumann, concerning the employment of prisoners in your county in light of the amendment of Section 221.170, RSMo 1959, by House Bill No. 194, 71st General Assembly. Section 221.170, as so amended, may be somewhat ambiguous on its face. However, as Mr. Baumann has advised you, a review of the legislative history of House Bill No. 194, with which you were not familiar, makes it clear that the intent of that bill was to change the law only in counties of the first class under charter form of government and counties containing a city of the first class and that paragraphs 1 to 12, inclusive, of amended Section 221.170 should have no application to other counties.

As introduced, House Bill No. 194 would have repealed Section 221.170 and enacted in lieu thereof the provisions now contained in paragraphs 1 to 11, inclusive, of amended Section 221.170, except that the first part of paragraph 1 read as follows: "Any person sentenced to a county jail or to a workhouse in cities outside a county for crime, * * *." The House amended the bill by adding what now appears as paragraph 12 except that the first part of the paragraph read as follows: "Any county or city outside of a county may suspend * * *." (See Perfected Bill.) The Senate amended the bill to change the first parts of paragraphs 1 and 12 to read as they now read in amended Section 221.170. (See Senate Journal for June 21, 1961, pages 1316 and 1317.) Finally, a conference committee amendment which added what now appears as paragraph 13 in amended Section 221.170 was adopted. (See Senate Journal for June 30, 1961,

pages 1586 and 1587, and House Journal for June 29, 1961, page 2045, and June 30, 1961, pages 2072 and 2073.)

The obvious purpose of the amendments during the course of passage of the bill was to reject the proposal that the change in the law with respect to the employment of prisoners should be applicable throughout the state and to provide, instead, that the law should remain unchanged except in counties of the first class under charter form of government and counties containing a city of the first class. Thus, there was no change in the law applicable to Johnson County, a county of the third class.

It is believed that this basically answers your questions concerning the employment of prisoners under amended Section 221.170. You are already familiar with the law as it had been construed prior to the recent amendment and the fact that the employment of prisoners in Johnson County in the manner contemplated by paragraphs 1 to 12 of the amended section would involve the disposition of earnings in a manner conflicting with provisions now contained in paragraph 13 of said section and would run afoul of restrictions upon the release of custody of prisoners by the sheriff. In the latter connection, we are enclosing a copy of an opinion furnished by this office to John Hosmer on December 20, 1954. Also, in the light of your discussion with Mr. Baumann, we are enclosing a copy of an opinion furnished to Robert L. Hoy on February 17, 1953, relating to the charging of a prisoner's board bill as part of the costs.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

2 enclosures

OPINION NO. 44(1962) 439(1961)
ANSWERED BY LETTER.

May 10, 1962



Honorable Ray G. Cowan
311 West Tenth Street
Kansas City, Missouri

Dear Judge Cowan:

For several weeks now we have given a great deal of study to the problem which has been posed to us regarding whether you could continue to receive your Circuit Judge retirement compensation and serve as a county court judge and be paid for same.

Frankly, Judge, I have had four different assistants consider the question. Two say Yes, two say No. As I view it, there are reasonably sound arguments either way.

The problem is whether or not there is, or may be, incompatibility in the two offices. One theory supported by cases would tend to indicate that the two offices would be incompatible because a judge might be called upon to act in a case where acts of a county court might be under review. The opposite theory is that this danger is too remote and that retired judges should not be precluded from other public service.

Basically, I think it is a practical decision which you will have to make insofar as determining what risk of losing your compensation is involved if you serve as a county judge.

I simply cannot say with any degree of calculated certainty how the Missouri Supreme Court would rule on this point.

Yours very truly,

TFE:ml

THOMAS F. EAGLETON
Attorney General

cc: Hon. Jasper M. Brancato

Opinion No. 47 (1962) answered by this letter
447 (1961)

January 9, 1962



Mr. Roderic R. Ashby
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Ashby:

This is in response to your recent inquiry as to whether the \$319.90 received by Mississippi County for its share in the distribution of federal surplus commodities may properly be ordered by the county court into your county's highway department funds. We understand that the reason the court desires to do this is to reimburse the highway department for expenditures it had made up to and through the month of September 1961 in carrying out the distribution of surplus commodities.

A reading of Senate Bill 147 of the 71st General Assembly reveals that it authorizes a county to establish surplus commodities distribution program and, to that end, grants powers which are extremely broad. Such a legislative approach is indicative of an intent that the distribution to needy persons be expedited without undue concern for technical niceties. In consonance with that approach, we fail to see any legal barrier to the placing of the funds into the highway department's account on a dollar-for-dollar basis in the amount of expenses incurred by that department in assisting in the county's program.

We do not, of course, in this letter pass in any way on the authority of the county court to use the county highway department and county highway department funds for the distribution of surplus commodities.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TOILETS:
SANITATION:
COSMETOLOGY, BOARD OF:
REGULATIONS:
ADMINISTRATIVE LAW:

The power to adopt sanitary rules as set forth in Section 329.210, RSMo 1959, does not confer upon the State Board of Cosmetology the authority to require establishments coming within its jurisdiction to install toilet facilities.

January 12, 1962



Mrs. Jakaline McBrayer
Executive Secretary
State Board of Cosmetology
Capitol Building, Room 127
Jefferson City, Missouri

Dear Mrs. McBrayer:

This is in reply to your request for an opinion of this office concerning the rule making powers of the State Board of Cosmetology, stated as follows:

"Do we have the authority to require shops to put in toilets in their shops?"

Nowhere in Chapter 329, RSMo 1959, which establishes the Board's control and supervision of cosmetologists, hairdressers and manicurists, do we find a legislative mandate to that effect. However, your regulations adopted pursuant to Section 329.210, RSMo 1959, and filed in accordance with Article VI, Section 16, of the Constitution of Missouri on July 28, 1961, allude to such a requirement in two places:

"Section 5. * * * Adequate and conveniently located toilet facilities shall be provided, and separated by self closing doors, for all beauty shops and schools of beauty culture and other establishments in which cosmetology, hairdressing and manicuring is practiced. * * *"

"Section 7. * * * All shops which exist in buildings also having living quarters must have toilet facilities located separately and apart from the living quarters."

Mrs. Jakaline McBrayer

If these regulations may be deemed to have been adopted in furtherance of some statutory power vested in the State Board of Cosmetology then they are lawful and must be enforced as the law of the land.

To resolve the question, therefore, a review of the Board's rule making authority is necessary. The only statutory direction available in that respect is to be found at Section 329.210, RSMo 1959.

"Powers of board. -- The board shall have power to:

"(1) Prescribe such sanitary rules as it may deem necessary with particular reference to the precaution necessary to be employed to prevent the creating and spreading of infectious and contagious diseases, and it shall be unlawful for the owner or manager of any shop or school in any city having a population of more than ten thousand inhabitants to permit any person to sleep in or use for residential purposes any room used wholly or in part as a hairdressing, cosmetological or manicurist's establishment. * * *

The pertinent authority conferred therein is the power to prescribe sanitary rules if it is possible to show that providing toilet facilities in a beauty shop or school of beauty culture or other establishment in which the named arts are practiced is a sanitary requirement.

In many instances the legislature itself has directed that certain named establishments furnish toilet facilities. A review of all of these is not necessary here but Section 196.210, RSMo 1959, pertaining to places where food is prepared will serve as an example. There the subject is amply covered and is so complete, as to the location and construction of such required toilets, that it need not be amplified by regulation of any kind. Nowhere in the statutes do we find the general authority to require the installation of toilet facilities conferred upon any regulatory agency without the legislature first specifically authorizing such authority.

Since the legislature has seen fit in many instances to require the installation of toilet facilities in certain named establishments, none of them coming within your jurisdiction, and since the legislature has failed to

Mrs. Jakaline McBrayer

specifically authorize you to adopt regulations concerning same, it must appear obvious that it was not their intent to do so. The generally accepted limitation upon the power of all governmental administrative agencies to promulgate rules and regulations is to be found in 73 C.J.S., page 414, § 94:

"A public administrative body may make only such rules and regulations as are within the limits of the powers granted to it and within the boundaries established by the standards, limitations, and policies of the statute giving it such power, and it may go no further than to make administrative rules and regulations which fill in the interstices of the dominant enactment. It may make only rules and regulations which effectuate a law already enacted, and it may not make rules and regulations which are inconsistent with the provisions of a statute, particularly the statute it is administering or which created it, or which are in derogation of, or defeat, the purpose of a statute, and it may not, by its rules and regulations amend, alter, enlarge, or limit the terms of a legislative enactment."

Clearly you are not to enlarge upon the authority delegated to you by the legislature to prescribe sanitary rules with particular reference to the precaution necessary to prevent the creating and spreading of infectious and contagious diseases. One fails to see how the Board expects to prevent the creation and spread of infectious and contagious diseases by requiring establishments under its jurisdiction to install toilet facilities. Certainly it must be conceded that the availability of such facilities to customers and employees of such establishments would further the cause of their comfort and convenience, but that really has nothing to do with the evil which the legislature seeks to prevent by authorizing you to adopt rules and regulations.

CONCLUSION

The power to adopt sanitary rules as set forth in Section 329.210, RSMo 1959, does not confer upon the State Board of Cosmetology the authority to require establishments coming within its jurisdiction to install toilet facilities.

Mrs. Jakaline McBrayer

The foregoing opinion, which I hereby approve, was prepared by my assistant, Howard L. McFadden.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

HLM:BJ

RETIREMENT:
STATE RETIREMENT SYSTEM:
STATE EMPLOYEES:
UNIVERSITY OF MISSOURI:

University of Missouri may amend its Retirement Plan to include its employees who are members of the State Employees' Retirement System, and thereby terminate their membership in the State System.

The University Retirement Plan may allow an employee, who is a member of the State Employees' Retirement System, to elect on the date he would otherwise become a member of the University Retirement Plan, to remain in the State Employees' Retirement System.

Opinion Request No. 457 (1961)
No. 51 (1962)

January 18, 1962

Honorable Robert R. Welborn
Chairman, Missouri State
Employees' Retirement System
State Capitol Building
Jefferson City, Missouri

51

Dear Mr. Welborn:

This is in reply to your opinion request of December 13, 1961, wherein you ask:

"1. May the Board of Curators of the University of Missouri amend the retirement plan of the University to cover employees of the University formerly members of the State Employees' Retirement System and thereby terminate the membership of such employees in the State system?

"2. May the University system permit an election by employees of the University as to whether or not they will be covered under the University system or under the State system, or must all employees of the University in the affected classifications be taken into the University system?"

The authority of the Board of Curators of the University of Missouri to establish a retirement system for persons employed by the University and paid out of its public funds for educational services is derived from Section 172.300, RSMo 1959. Said statute states, in part, that the Board of Curators may appoint and remove employees of the University,

define and assign their powers and duties, and fix their compensation,

"and such compensation may include payments under, or provisions for, such retirement, disability or death plan or plans as the curators deem proper for persons employed by the university and paid out of any of its public funds for educational services, their beneficiaries or estates, and the curators may administer such plan or plans under such rules and regulations as they deem proper; . . ."

Pursuant to this statutory authority, the Board of Curators of Missouri University has adopted an amended "Retirement, Disability and Death Benefit Plan" whereby employees of the university as a condition of their employment are required to become members of the University Plan. To this general requirement, however, there exists an exception, which appears in Section 3 (6) (c), and which states:

"In exceptional cases, such employees of the University who have prior service with the Missouri State Employees' Retirement System at the date they would become members of this plan who request in writing that they not be made members of the plan and consent thereto is granted by the Board shall not be members of the plan."

Thus, under its amended Retirement Plan, the University of Missouri has included in its membership those employees who had prior service with the State Employees' Retirement System at the date said employees would become members of the University Plan.

These employees, however, may elect not to join the University of Missouri Plan, and, with the consent of the Board of Curators, remain in the Missouri State Employees' Retirement System.

If this action is valid, said employees generally cannot simultaneously retain membership in both the University of Missouri Retirement Plan and the State Employees' Retirement System.

This is due to Section 104.310, RSMo 1959, which defines an "employee" under the Missouri State Employees' Retirement System.

Subsection 15 of said section states as follows:

"'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor, except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.550, the term 'employee' shall include civilian employees of the Army National Guard or Air National Guard of this state who are employed pursuant to section 709 of title 32 of the United States Code and paid from federal appropriated funds;"

That the state is a contributor to the funds of the University of Missouri Retirement Plan is indicated by Section 1 of said plan. Said section states:

"From time to time as necessary or desirable, at the sole discretion of the Board of Curators, acting under the advice of the actuary under the plan, monies shall be transferred to the fund from state-appropriated or other public funds under control of the Board. All benefits provided under the plan for persons employed by the University and paid out of any of its public funds for educational services, their widows,

beneficiaries or estates, shall be paid from the fund by the trustee upon instruction of the Retirement Committee (as provided for in Sec. 2A)."

Therefore, an individual who is an employee of the University of Missouri, and who would otherwise be eligible for membership in the Missouri State Employees' Retirement System, would be excluded from the definition of "employee" under Section 104.310 (15), RSMo 1959, and, with exceptions noted below, cannot be a member of the Missouri State Employees' Retirement System during the period he retains membership in the University of Missouri Retirement Plan.

However, there exist three exceptions to the aforesaid proposition. These exceptions are set forth in the Missouri State Employees' Retirement System, Section 104.330 (1), RSMo 1959, which states:

"1. As an incident to his contract of employment or continued employment, each employee of the state shall become a member of the system on the first day of the first month following the effective date of sections 104.310 to 104.550, and every person thereafter becoming an employee shall become a member at the time of employment. Each employee's membership shall continue as long as he shall continue to be an employee; be on leave for military service or training as hereinafter provided; or receive or be eligible to receive an annuity or benefit; except that (1) any member who has served eight or more years as a member of the general assembly and who has not been refunded his accumulated contributions to the fund, or (2) any member other than a member of the general assembly, who has served fifteen or more years as an employee, and who has not been refunded his accumulated

contributions to the fund, shall
continue as a member of the system."

The Missouri Legislature by Section 172.300, RSMo 1959, has expressly conferred upon the Board of Curators of Missouri University the right to establish a retirement plan for the employees of said University. There being no language to the contrary in the statute, the Board of Curators necessarily has the right to amend the plan which the statute gives the Board the right to establish.

Thus, the amendments to the University of Missouri Retirement Plan by its Board of Curators whereby said plan is amended to cover University employees formerly members of the State Retirement System and thereby terminate the membership of such employees in the Missouri State Employees' Retirement System is a valid exercise of its power granted by Section 172.300, RSMo 1959.

In addition, Section 3 (6) (c) of the University Retirement Plan, which permits a University employee, with prior service with the State Employees' Retirement System on the date his membership would become effective in the University plan, to remain in the State System with the Curators' approval, and thereby not join the University Plan is also a valid exercise of the Board of Curators' power under Section 172.300, RSMo 1959.

Because Section 3 (5) (c) of the University Plan is an exception that must be exercised by a University employee in his individual capacity whereby he will not become a member of the University Plan, said section applies only to those employees who possess the qualifications for exemption under this section (membership in Missouri State Employees' Retirement System on the date the employee otherwise would become a member of the University Retirement Plan) and not to the University employees as a whole.

CONCLUSION

1. The Board of Curators of the University of Missouri may amend the retirement plan of the University to cover University employees formerly members of the State Employees' Retirement System and thereby terminate the membership of such employees in the State System, except that a member who

is receiving or eligible to receive an annuity from the Missouri State Employees' Retirement System, or any member who has served eight or more years as a member of the General Assembly and who has not been refunded his accumulated contributions to the fund, or any member, other than a member of the General Assembly, who has served fifteen or more years as an employee, and who has not been refunded his accumulated contributions to the fund does not by his inclusion in the University system terminate his membership in the State system.

2. The amendment to the Retirement Plan of the University of Missouri by its Board of Curators permitting a University employee, who is a member of the Missouri State Employees' Retirement System on the date he otherwise would become a member of the University Retirement Plan, to elect not to join said Plan but remain in the State Plan with the Board of Curators' consent, applies only to the eligible employee exercising the privilege under this exemption and not to University employees as a whole, and is a valid exercise of the Board of Curators' powers under Section 172.300, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD:mc

STATE RETIREMENT SYSTEM: On or after October 13, 1961, a
LEGISLATURE: member of the Missouri State
RETIREMENT: Employees' Retirement System
who retires after his 65th birth-
day with six years' service as a
member of the general assembly is
entitled to a minimum annuity of
\$25.00 per month per term.

March 2, 1962

OPN. 52-1962
458-1961

Honorable Arkley W. Frieze
State Senator, 32nd District
307 South Main
Carthage, Missouri



Dear Mr. Frieze:

This is in reply to your opinion request of December 16, 1961, wherein you state in part as follows:

"Mr. W. O. Hanks, who has been the legal advisor for the Joplin branch of the Workmen's Compensation Division, is retiring on December 31, 1961, having reached the age of 70 years in June of 1961. Mr. Hanks has been the legal advisor since the Joplin branch office was created and went into operation on July 1, 1956 and has served continuously in that capacity to the present time.

"Mr. Hanks had six years previous service in the House of Representatives of Missouri, having served in the 59th, 60th and 61st General Assemblies of Missouri, or continuous service from January 1, 1937, to January 1, 1943.

"Please furnish me with an opinion from your office as to the amount of retirement benefits under the facts herein stated, in your opinion, Mr. Hanks would be entitled to."

Section 104.390, Missouri Revised Statutes Cumulative Supplement 1961 (H.B. Nos. 131 & 410 § 1) states as follows:

Honorable Arkley W. Frieze

"The normal annuity of a member shall equal one per cent of the average compensation of the member multiplied by the number of years of creditable service of such member, except that the minimum annuity of any member who has served six or more years as a member of the general assembly and who meets the conditions for retirement at or after normal retirement age shall consist of monthly payments made at the rate of twenty-five dollars multiplied by the number of biennial assemblies in which he has served; provided, however, that the annuity of any member shall never exceed two-thirds of the compensation being paid to members of the General Assembly."

The precise language of this statute directs that any person who has at any time served six or more years as a member of the general assembly shall be entitled to a minimum annuity of twenty-five dollars per month, provided however, that said individual is a member of the Missouri State Employees' Retirement System at the time of retirement and meets the conditions for retirement at or after normal retirement age.

Section 104.310(21) RSMo 1959, defines the term "normal retirement age" at 65 years for all members.

Because Mr. Hanks was an employee of the Workmen's Compensation Division on the date of his retirement on December 31, 1961, he was a member of the Missouri State Employees' Retirement System at that date. In addition, he was over 65 years of age and therefore entitled to the normal annuity.

Furthermore, he had previously served six years as a member of the general assembly (January 1, 1937 to January 1, 1943). Thus, he would be entitled to receive a minimum annuity of \$25.00 per month per term or a total of \$75.00 per month under Section 104.390 Missouri Revised

Honorable Arkley W. Frieze

Statutes Cumulative Supplement 1961 (H. B. Nos. 131 & 410 § 1).

CONCLUSION

On or after October 13, 1961, a member of the Missouri State Employees' Retirement System who retires after his 65th birthday with six years' service as a member of the general assembly is entitled to a minimum annuity of \$25.00 per month per term or a total of \$75.00 per month under Section 104.390 Missouri Revised Statutes Cumulative Supplement 1961 (H. B. Nos. 131 & 410 § 1).

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

BUDGETS:
POLITICAL SUBDIVISIONS:

Political subdivisions referred to in Chapter 67, RSMo Cum. Supp. 1961, making expenditures without full compliance with such law causes those expenditures to be illegal.

OPINION NO. 53 (62) 461 (61)

April 11, 1962

Honorable William Baxter Waters
Member, Missouri State Senate
First National Bank Building
Liberty, Missouri



Dear Senator Waters:

This opinion is in reply to your inquiry concerning Senate Bill No. 171, passed by the 71st General Assembly and amending Chapter 50, RSMo 1959, by adding one new section to said chapter, and enacting ten new statutes which have been placed in a new Chapter 67, RSMo Cum. Supp. 1961, entitled "Budgets For Political Subdivisions", composed of statutes numbered Section 67.010 to 67.100, inclusive. The specific question posed is extracted from your inquiry and reads as follows:

"I should, therefore, like to request an official opinion from your office that if the provisions of the act are not complied with by a political subdivision of this state, as defined under the act, are expenditures thereafter made legal expenditures?"

Article VI, Section 24, Missouri's Constitution of 1945 provides:

"As prescribed by law all counties, cities, other legal subdivisions of the state, and public utilities owned and operated by such subdivisions shall have an annual budget, file annual reports of their financial transactions, and be audited."

Section 67.010, RSMo Cum. Supp. 1961, describes the objective of this new law and reads, in part, as follows:

Honorable William Baxter Waters

"1. Each political subdivision of this state, as defined in section 70.120, RSMo, except those required to prepare an annual budget by chapter 50, RSMo, and Sections 167.130, 167.160, 167.200, and 167.240, RSMo, shall prepare an annual budget. The annual budget shall present a complete financial plan for the ensuing budget year, and shall include at least the following information: * * *."

"Political subdivision" is defined in the following language from Section 70.120, RSMo 1959:

"* * * (2) 'Political subdivision' shall mean any agency or unit of this state which now is, or hereafter shall be, authorized to levy taxes or empowered to cause taxes to be levied."

Section 67.080, RSMo. Cum. Supp. 1961, provides:

"The expenditure orders, motions, resolutions, or ordinances approved or adopted and filed as provided herein, and the transfers made as provided herein, shall constitute the authorization for the expenditure of money for the budget year. No expenditure of public moneys shall be made unless it is authorized as provided herein". (Underscoring supplied.)

Section 67.100, RSMo. Cum. Supp. 1961, provides:

"Each political subdivision covered by the provisions of this chapter shall prepare and approve a budget and shall authorize expenditures in the manner provided herein for each fiscal year which begins after June 30, 1962, and this chapter shall apply to each such budget and expenditure authorization."

Honorable William Baxter Waters

When we consider the purpose of the new law as expressed in Section 67.010, supra, the positive and mandatory language found in Section 67.080, supra, stating that "no expenditure of public moneys shall be made unless it is authorized as provided herein", and the language found in Section 67.100, supra, making the preparation and approval of an annual budget mandatory as to the "political subdivisions" affected, after June 30, 1962, a reasonable conclusion is inescapable that the new law on its face will cause expenditures made in disobedience to the law to be illegal expenditures.

Missouri's statutes applicable to annual budgets to be prepared by counties as political subdivisions of the State have been construed by our courts and decisions rendered in such cases may be looked to in order to support the conclusion to be reached in this opinion. In the case of Missouri-Kansas Chemical Corporation v. New Madrid County, 345 Mo. 1167, 139 S.W. 2d 457, the Supreme Court of Missouri was construing the county budget law and was particularly concerned with the following language of such law now found at paragraph 3 of Section 50.740, RSMo 1959:

"3. Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this law shall be void and of no binding force and effect; * * ."

The items of expenditure made in the New Madrid County case, cited above, were in excess of the budget allowances therefor in the respective years involved, and in the light of that portion of Section 50.740, RSMo 1959, quoted above, the Supreme Court spoke as follows at 345 Mo. 1167, 1.c. 1169:

"On the record made any order of the county court seeking to effect the payment of the balance due, under the quoted provision of Sec. 8, supra, would be void and of no binding force and effect."

In the case of Traub v. Buchanan County, 341 Mo. 727, 108 S.W.2d 340, the defendant county defended against a claim on the grounds that the county budget law was not complied with in relation to the contracts. In such case the claimant advanced argument which the Supreme Court interpreted as a

Honorable William Baxter Waters

contention that the county, appellant, was estopped to assert the invalidity of the contracts. With reference to such contention the Supreme Court spoke as follows at 341 Mo. 727, l.c. 732:

"We need not discuss this question at length, because in a recent case, decided by the United States Circuit Court of Appeals, Eighth Circuit, this identical situation was fully considered. [See Layne-Western Co. v. Buchanan County, Missouri, 85 Fed. (2d) 343.] There, a contractor, who had performed his contract, sued the county to recover the contract price. Noncompliance with the budget law was the principal defense of the county. The court discussed the doctrine of estoppel and held that the established rule in Missouri is, that the county was not estopped to make the defense in question."

The Supreme Court of Missouri, in Traub v. Buchanan County, supra, quoted Judge Stone in the Layne-Western case, cited above, as follows at 341 Mo. 727, l.c. 732:

"The Missouri rule is that where the statute expressly states that, unless certain things are done, a contract by a political subdivision or a municipal corporation shall be invalid, there can be no estoppel urged to support the contract. * * *"

A close reading of Section 67.080, RSMo. Cum. Supp. 1961, quoted in the forepart of this opinion demonstrates that the steps prescribed to be taken by the Act form the basis for the authority to be exercised thereunder, and such statute then concludes that "no expenditure of public moneys shall be made unless it is authorized as provided herein". If expenditures are prohibited, it follows that by their nature they will be invalid. Of special application to the question of powers here being considered, we quote from Mullins v. Kansas City, 268 Mo. 444, l.c. 460-461, 188 S.W. 193:

Honorable William Baxter Waters

"Statutes and charter provisions constitute powers of attorney to the officers of municipalities, beyond which such officers may not go. Those dealing with such agents of municipalities must be held to know these statutory and charter powers which effectually limit such officers' powers and radius of action. Officers of municipalities are not general agents; they are special agents, whose duties are set forth in the statutes which create them and which define their powers, and of these statutes, and therefore of these officers' powers, the public which deals with them must take notice and govern themselves accordingly."

Decisions referred to and quoted above disclose that a political subdivision of the State is not estopped from denying claims made against it growing out of contracts which have not been effected and carried out according to statutory provisions in relation thereto. For Section 67.080, RSMo. Cum. Supp. 1961, to conclude that "no expenditure of public moneys shall be made unless it is authorized as provided herein" is tantamount to saying that expenditures made without full compliance with such law are illegal.

In enacting this law the legislature was not unmindful of possible delays which might prevent a political subdivision from having its budget approved and adopted at the very beginning of a current fiscal year, thereby jeopardizing necessary expenditures for "operation and maintenance" so vital to the proper functioning of a political subdivision. With a view to alleviating such a situation, Section 67.070, RSMo. Cum. Supp. 1961, was included in this law and reads as follows:

"If at the beginning of any fiscal year any political subdivision has not approved or adopted and filed the budget and the expenditure orders, motions, resolutions, or ordinances required herein for the current fiscal year, and except as otherwise

Honorable William Baxter Waters

provided by law or charter the several amounts authorized in the expenditure orders, motions, resolutions, or ordinances for the next preceding fiscal year for the objects and purposes specified therein, so far as the same shall relate to operation and maintenance expenses, shall be deemed to be reappropriated for the several objects and purposes specified in said expenditure orders, motions, resolutions, or ordinances, until such time as the budget and the expenditure orders, motions, resolutions, or ordinances for the current fiscal year are approved or adopted and filed as required herein."

CONCLUSION

It is the opinion of this office that political subdivisions referred to in Chapter 67, RSMo Cum. Supp. 1961, making expenditures without full compliance with such law causes those expenditures to be illegal.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'M:at

TAXATION of PERSONAL PROPERTY:
ASSESSOR:
CITY OF ST. LOUIS:

Tangible personal property located in the City of St. Louis, owned by a resident of another county, must be assessed in the county where the owner resides and not in the City of St. Louis (except houseboats, cabin cruisers and automobile trailer houses used for lodging).

January 25, 1962

Honorable John A. Williams
Chairman, State Tax Commission
Jefferson Building
Jefferson City, Missouri



Dear Mr. Williams:

This opinion is issued in answer to your request as follows:

"We desire an official opinion with regard to personal property, for the purposes of taxation, that is situated and located in the City of St. Louis, owned by an individual who operates in the City of St. Louis and resides in St. Louis County as of the assessment date.

"Section 137.090 provides that tangible personal property is to be assessed in the county of the owner's residence.

"Section 137.495 provides that every person, corporation, partnership or association subject to taxation under the laws of this State and owning or controlling personal property taxable by the cities shall file with the assessor of the cities a return listing all such tangible personal property so owned or controlled on January 1 of each year.

"We enclose a letter indicating that an individual residing in St. Louis County,

Honorable John A. Williams

Missouri, has received a call from the inspector from the assessor's office of the City of St. Louis and that he stated the taxpayer would be obliged to report property in the City of St. Louis for assessment in the City of St. Louis.

"We also enclose herewith a letter of the Assessor of the City of St. Louis requesting an opinion and inquiring as to whether the Attorney-General's opinion of March 30, 1951, the conclusions of which is as follows,

'It is therefore the opinion of this department that tangible personal property located in the City of St. Louis and owned by a resident of St. Louis County shall be returned for taxation purposes by such person to the assessor of the City of St. Louis in accord with the provisions of Section 137.495 and not to the assessor of St. Louis County, the county of his residence,'

is still in effect."

The opinion of this office dated March 30, 1951, to which you refer was based upon the language of Section 137.495 as then in effect. This section by its terms applied only to the City of St. Louis. To the extent here relevant, it required every person subject to taxation and owning or controlling taxable tangible personal property situated in such city to return such property to the assessor of the City. That law was passed at the same (1945) session of the General Assembly at which Section 137.090 was passed. The latter section provided in part that all tangible personal property situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides. In order to give effect to both laws, this office ruled that tangible personal property located in the City of St. Louis must be returned for taxation to the assessor of the City of St. Louis, even though the owner resides in another county. It also may be noted that Section 137.490, as it then read, specifically required the assessor to assess all taxable tangible personal property within the city.

Honorable John A. Williams

Sections 137.490 and 137.495 were amended in 1959 by House Bill No. 108, a revision bill enacted by the 70th General Assembly. As so amended, Section 137.490 no longer requires the assessor to assess all taxable tangible personal property located within the city. Instead, as amended, it provides, to the extent here relevant as follows:

"The assessor, or his deputies under his direction, shall assess * * * all tangible personal property taxable by the city under the laws of this state."

And Section 137.495 has been amended to read, so far as here relevant:

"Every person * * * subject to taxation under the laws of this state and owning or controlling tangible personal property taxable by [the city of St. Louis] shall file with the assessor of [the city] a return listing all such tangible personal property * * *"

Hence, under the statutes as amended in 1959, only tangible personal property which is taxable by the City of St. Louis under the laws of the state may be assessed for taxation by the assessor of such city. He may no longer assess for taxation property of individuals simply because such property is situated within the city without regard to the residence of the owner. This conclusion is in accord with the revisor's notes contained on the original House Bill No. 108 explaining the purpose and effect of the proposed amended sections. Under the proposed new Section 137.490, the following explanation appears:

"This and the following section provide only for the assessment of taxable tangible personal property situated within the city. The language is changed to conform to the policy of the state of assessing personalty in the county where the owner resides."

And under the proposed new Section 137.495 there appears the following revisor's note:

"See explanation following preceding section."

Honorable John A. Williams

Section 137.090, RSMo 1959, which formerly applied to all counties except only the City of St. Louis now applies to the City of St. Louis as well. Attention is directed to the 1961 amendment to Section 137.090 by House Bill 636, which requires that houseboats, cabin cruisers and automobile trailer houses used for lodging shall be assessed in the county where located. Hence, all taxable tangible personal property owned by individuals situated in a county other than the one in which the owner resides (except houseboats, cabin cruisers and automobile trailer houses used for lodging) may be assessed for taxes only in the county of the owner's residence.

The opinion dated March 30, 1951, to Honorable Clarence Evans, Chairman, State Tax Commission, is no longer in accord with the law of this state and should not be followed.

CONCLUSION

It is the opinion of this office that tangible personal property located in the City of St. Louis and owned by an individual resident of St. Louis County or of any other county (except houseboats, cabin cruisers and automobile trailer houses used for lodging) shall be returned for taxation by such person to the assessor of the county of his residence and not to the assessor of the City of St. Louis.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

TAXATION:
SALES TAX:
PUBLIC SERVICE COMMISSION:
PUBLIC UTILITIES:

A consumer of services sold by utilities is responsible for paying sales tax upon the total amount charged. This obligation is not changed by the utility billing its customers with a basic charge plus a charge for defraying a local license tax--the two charges equalling the total amount paid for the service.

Opin. No. 56 ('62)
" " 465 ('61)

April 12, 1962

Mr. M. E. Morris
Director of Revenue
Department of Revenue
State of Missouri
Jefferson City, Missouri

FILED
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Dear Mr. Morris:

This is in response to Mr. Stapleton's letter dated December 27, 1961, in which he requests an official opinion for you from this office. In his letter he states:

"When the Public Service Commission of Missouri orders a utility company to add to the monthly bill of the customer, as separate items, a surcharge equal to the proportionate part of any license, occupation or other similar fee or tax applicable to service by the company to the customer, which fee or tax is imposed upon the company by local taxing authorities on the basis of the gross receipts, net receipts, or revenues from sales by the company; the question raised is whether or not Missouri sales tax should be collected on the total amount paid by the customer, which includes the surcharge, even though the surcharge is set out as a separate item."

Your opinion request is based upon a recent policy decision of the Public Service Commission concerning license or occupational tax levied by cities against utilities for the privilege of conducting business within the city. The Public Service Commission, in establishing rate schedules

for utilities, has been and will continue to include within its order the provision whereby these local gross receipts taxes will be passed on to the consumers residing within the taxing municipality. The Commission has ordered the utilities to treat these city license taxes as an item apart from their system operating expenses. As stated in your letter, the utility company adds to the monthly bill of the customer a separate item reflecting the proportionate part of the tax.

It should be remembered at all times that the local city gross receipts tax is a tax upon the privilege of the utility to do business within the city. It is not a sales tax. In fact, Section 144.460, RSMo 1959, specifically prohibits any city, town or village from directly or indirectly levying, imposing or collecting any sales tax. This entire problem was discussed in State ex rel. Hotel Continental et al. v. Burton, et al., Mo. Sup., 334 SW 2d 75. In that case the Missouri Supreme Court upheld an order of the Public Service Commission which, besides establishing a rate increase for a utility, included a tax adjustment clause whereby monthly bills to customers would reflect a surcharge measured in the manner set forth in your request. At page 83, the Court said:

"Appellants contend further that city is prohibited by law from enacting a sales tax on the consumer and, we suppose, the argument is (although not developed in the brief) that the city by changing the rate of the present gross receipts tax or by enacting a new tax based on company customer revenue, would be levying and collecting a tax in the guise of a tax on the utility, which would be in reality a tax on the customer. It is true that Section 144.460 prohibits the city from directly or indirectly imposing or collecting a tax on the sale of any service which has been taxed by the state under the sales tax law; and it is also true that the

state does tax the sale of service by utilities, e.g., the sale of steam in the instant case. This court has held that a city may lawfully levy a gross receipts tax upon a utility. Thus, if the present tax is lawful because imposed on the company, any new tax (covered by the tax clause) levied by city would be imposed on the utility to the same extent and thus, like the present tax, would be lawful. Under the present tax as well as under any new tax the money with which the company pays or would pay the tax is and always would be paid by the customers; and that is true irrespective of what billing system was used or of how many hearings were held. Thus, if the city changed the rate of the present tax or levied any new tax covered by the tax adjustment clause, there would be no change in the nature of such new or additional tax, no change in the payer of that tax, and no change in the source of the money with which that tax would be paid. The tax adjustment clause does not purport to, and by its operation could not, change the incidence of the present gross receipts tax or the incidence of any new tax based on steam customer revenue. (Emphasis added.)

The question of whether the Public Service Commission's order illegally interferes with a city's power to tax was discussed in State ex rel. City of West Plains, et al. v. Public Service Commission, et al., Mo. Sup., 310 SW 2d 925. The appellants in that case contended that the order converted the tax from a levy against a utility into one against the subscribers of the utility's service. The Court stated that this reasoning was fallacious. It went on to state, at page 934:

"The utility remains the party taxed and the utility still pays the tax -- the only effect of the commission's order in that respect is to permit the utility to collect the money with which to pay the tax from the tax beneficiaries rather than from all subscribers. It must be apparent that a utility's subscribers will always provide the money for payment of all taxes -- the utility has no other source of revenue -- the only question is which subscribers should pay which tax. Under the commission's order, Western receives no more money and no higher rate of return than it would receive under its prior practice of collecting occupation taxes systemwide." (Emphasis added.)

Section 144.020, RSMo 1959, establishes the Missouri sales tax rate at two per cent of the amount paid by customers for services sold by utilities. The above cited cases uphold the theory that an order of the Public Service Commission requiring utilities to pass a local tax on to the inhabitants of the taxing authority changes nothing. The incidence of the local tax is still upon the utility. However, city customers of the utilities' service will be paying both the basic charge plus an amount equal to their proportionate share of the local tax. The result of this new procedure means that city customers will be paying a sales tax upon the basic charge plus the local tax, the combined amount being the total paid for a utility's services.

CONCLUSION

Regardless of whether a utility bills its customers with a single figure showing the total amount charged for services rendered, or if the billing displays a basic charge plus a proportionate charge based upon a local license tax, the customer is still liable for the payment of Missouri sales tax upon the total amount charged.

Mr. M. E. Morris

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This opinion, which I hereby approve, was prepared
by my assistant, Eugene G. Bushmann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

EGB:mc

MAGISTRATES:
BOARD OF ELECTION
COMMISSIONERS:
REDISTRICTING
MAGISTRATE DISTRICTS:
COUNTIES OF SEVENTY TO
ONE HUNDRED THOUSAND:

Additional magistrate in Clay County, Missouri authorized by order of Circuit Court under authority of Section 482.010, does not automatically become the second regular magistrate to which the county is now entitled by virtue of its population; effective as of January 1, 1963, there will no longer be any additional magistrate in Clay County; no particular period of residence in the district from which he is elected is required of a magistrate in order to qualify for the office.

OPINION NO. 57

February 15, 1962

Honorable Richard E. McFadin
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Mr. McFadin:

We have received your request for an opinion of this department, which request reads as follows:

"Please find a copy of questions submitted for opinions, by the Clay County Election Board.

1. Does the Magistrate Court in Clay County, Missouri, created by order of the Circuit Court as of August 1, 1948, for a four-year term, with the present term expiring on December 31, 1962, automatically become the second magistrate required by the state for population provided in Section 482.010 V.A.M.S. on January 1, 1963?

2. If the answer is yes, does it follow that the State becomes responsible for the payment of the salary of the additional magistrate, clerks, etc. on January 1, 1963, and if so, must the Board of Election Commissioners redistrict prior to April 1, 1962, into districts as near equal population wise?

Honorable Richard E. McFadin

"3. If the answer is no, to question No. 1, then will Clay County have three magistrate courts on January 1, 1963, divided into districts equal population wise?

"4. If Clay County will have three magistrate courts on January 1, 1963, (two by the State and one by the Circuit Court), may the Circuit Court on proper petition abolish or dissolve the magistrate court created by it and if so when may this be done in order to retain that magistrate court until January 1, 1963?

"5. If the Circuit Court can in 1962 dissolve the magistrate court created by it, effective January 1, 1963, does it follow the Board of Election Commissioners shall divide the county into two districts as near equal in population, and if so, when?

"6. If the answer to No. 4 is No, then does the Election Board divide the county into three districts as near equal in population as possible and when must this be done, and can these districts be altered or dissolved prior to the next election of magistrate judges?

"7. Is a candidate for the office of magistrate required to reside in his district a certain period of time in order to qualify for the office and, if so, for how long?"

We turn first to a consideration of whether the additional magistrate, authorized by order of the Circuit Clerk of Clay County on June 23, 1948, automatically becomes the second magistrate required by Section 482.010, RSMo 1959, for counties with a population over seventy thousand and under one hundred thousand. We hold that he does not.

Section 482.010, RSMo 1959, above referred to, provides for two types of magistrate judges. First, this section requires what might be termed "regular magistrates", i.e. those which a county must have because of its population. Secondly, it provides for "additional magistrates", which may be authorized in addition to the number of "regular magistrates" if the circuit court of the county involved finds that the administration of justice requires it. This classification is exemplified in Section 482.150,

Honorable Richard E. McFadin

RSMo 1959, which provides that the salaries of regular magistrates are to be paid by the county. Since these classifications are separate and distinct, we believe that an additional magistrate office cannot be transformed into a regular magistrate office.

Our answer to your first question being in the negative your second question is rendered moot and we next consider the third question propounded in your request - whether Clay County will have three magistrates as of January 1, 1963, and if so whether the county will have to be divided into three magistrate districts with equal population.

The number of magistrates in each county is fixed in our Constitution, Section 18, Article V. Section 482.010, paragraph 1, RSMo 1959, merely copies the constitutional provision. Both the constitution and the statute authorize the Circuit Court upon petition and after hearing to increase the "foregoing number" of magistrates in any county "according to the needs of justice", and similarly to decrease "such increased number". The "foregoing number" obviously refers to the number fixed by the Constitution and statute, namely one magistrate in counties in the thirty to seventy thousand classification and two magistrates in the seventy to one hundred thousand classification.

The order of the Clay County Circuit Court made June 23, 1948, which created the additional magistrate for that county, stated that the number of magistrates was to be increased by one. This could, of course, mean only that the number of magistrates in 1948 required in the interest of justice was two. Now that the situation is changed so that by reason of the increase in population "the foregoing number" is two, the 1948 order authorizing an increase in the number of magistrates from one to two can not be construed to be a finding that the number should be increased from two to three. Bearing in mind the necessity that the court make the finding "according to the needs of justice" it is our opinion that when the county becomes entitled to two "regular magistrates" as of January 1, 1963, the 1948 order is functus officio and no longer of any force or effect. Hence, effective with the incumbency of the new "regular magistrate" there will no longer be any additional magistrate, unless and until the Circuit Court makes a new finding, after a hearing,

Honorable Richard E. McFadin

that the needs of justice require that the number of magistrates be increased from two to three (or four).

The next question contained in your request is whether the Clay County Circuit Court has the power to abolish the office of the additional magistrate created on June 23, 1948. You further ask when such abolition should be accomplished in order to retain the additional magistrate until January 1, 1963. Under the reasoning and conclusion stated in answer to the third question contained in your opinion request no such court order would be necessary.

A further question is stated in your request as to whether the Board of Election Commissioners of Clay County should divide the county into two magistrate districts and if so, when. The first part of this question must be answered in the affirmative. A duty is imposed on the Board of Election Commissioners to so divide the county by Section 19, Article V of the 1945 Constitution of Missouri. This same section requires that the duty be performed "after each census". (Note: Because of this mandatory requirement of the Constitution, the statutory requirement contained in Section 482.040, RSMo 1959, that the Board of Election Commissioners divide the county into magistrate districts within sixty days after being "officially informed" that the duty of so doing has arisen, is necessarily directory.) The old districts automatically go out of existence after each census, and the Board must establish two new districts. Of course, if the constitutional requirements are met, the Board could conceivably establish districts with boundary lines identical to those of the present districts.

The last question contained in your request is whether a candidate for the office of magistrate is required to reside within his district for a certain period of time in order to qualify for office.

Section 482.040, paragraph 2, RSMo 1959, states only that, after division of a county into magistrate districts, one magistrate shall be elected in each "who shall be a resident of the district in which he is elected." The rule followed in Missouri absent specific requirements as to eligibility as of date of election is that the eligibility of an officer is to be determined as of the time of commencement of the term. See State ex inf. Mitchell ex rel Goodman v. Heath, (1939) 345 Mo. 226, 132 SW 2d 1001, i.e. 1005 and State ex inf. Major ex rel

Honorable Richard E. McFadin

Ryora v. Brauer (1911) 235 Mo. 240, 138 SW 515.

It is further to be noted that Section 482.050, RSMo 1959, requires each magistrate to "qualify" and enter upon the discharge of his duties on January 1 following his election. This statute further provides that in case the judge elect "refuse to qualify" such refusal shall constitute a vacancy in the office "from and after the date on which such judge-elect is required to qualify." Reading all of the statutes together and in the light of the policy of Missouri to require eligibility to be determined as of the date of commencement of the term we hold that a candidate for the office of magistrate is not required to reside in his district for any particular period of time prior to qualifying for the office.

CONCLUSION

It is the opinion of our office that the additional magistrate in Clay County, Missouri does not automatically become the second regular magistrate to which the county is now entitled by virtue of its population; we further hold that effective as of January 1, 1963, there will no longer be any additional magistrate. Finally, we hold that no particular period of residence in the district from which he is elected is required of a magistrate in order to qualify for the office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Ben Ely, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

BE:ms

January 22, 1962

FILED
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Honorable Dan Hale
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Hale:

We are in receipt of your letter of recent date in which you ask whether the wife of an attorney can qualify as a surety on a bail bond. As pointed out in your letter, Rule 32.14 of the Missouri Supreme Court Rules of Criminal Procedure prohibits attorneys at law from being bail bond sureties. Rule 32.15 of the Missouri Supreme Court Rules of Civil Procedure requires that sureties, in order to qualify as such on the basis of real estate owned, must be the sole, legal and equitable owner in fee simple of the real estate involved.

Section 451.250, RSMo 1959, paragraph 1, provides:

"1. All real estate and any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income, increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband."

Under the foregoing statute a married woman can own property as the sole, legal and equitable owner in fee

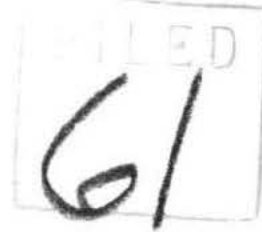
simple thereof. Such property put up by her as security for a bail bond would be a proper basis for the bond. Her husband, if an attorney, would have no interest in the property; therefore the prohibition of Rule 32.14 would be inapplicable.

Yours truly,

THOMAS F. EAGLETON
Attorney General

BE:ms

January 9, 1962



Honorable Vernon E. Betz
State Representative
Grundy County
Trenton, Missouri

Dear Mr. Betz:

We are in receipt of your letter of January 3, 1962, requesting information regarding taxation of the income of railroad employees who earn their income in two states.

We direct your attention to Subsection 1 of Section 143.010, RSMo 1959, which reads as follows:

"Every single individual, a citizen or resident of this state having a gross income in excess of one thousand two hundred dollars, and every married couple, citizens or residents of this state having a gross income in excess of two thousand four hundred dollars, shall file an income tax return or returns, and pay a tax upon net income received, from all sources during the preceding year in excess of the exemptions herein provided."

We also direct your attention to Section 143.160, Subsection (5) (a), RSMo 1959, which reads as follows:

"In ascertaining net income there may be deducted from gross income derived during the same period the following:

(5) Income on which tax is paid in another state or country or in the District of Columbia:

(a) Such part of the income in any taxable year on which a tax is imposed by any other state or country or the

Honorable Vernon E. Betz

#2

District of Columbia and paid to such state or country or the District of Columbia shall be deducted where such income is included in the taxpayer's return, but such credit shall not exceed such proportion of the tax payable under this chapter as the income subject to tax in such other state or country or the District of Columbia bears to the taxpayer's net income upon which the tax is imposed by this chapter."

We enclose a copy of an opinion of this office issued July 18, 1947, to the Honorable M. E. Morris, which we believe adequately answers the problem posed in your request.

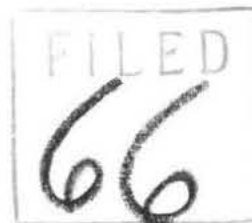
Yours very truly,

THOMAS F. EAGLETON
Attorney General

BE:ml
Enc.

INSURANCE: Articles of Incorporation of Town and Country
Security Life Insurance Company.

January 10, 1962



Honorable Jack L. Clay
Superintendent, Division of
Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

Receipt is acknowledged of your letter of January 3, 1962 with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Town and Country Security Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'M: jh

INSURANCE: Articles of Incorporation of Kansas City
Casualty Company

January 10, 1962



Honorable Jack L. Clay, Superintendent,
Division of Insurance,
Jefferson Building,
Jefferson City, Missouri

Re: Proposed Kansas City Casualty Company

Dear Mr. Clay:

Pursuant to your request of January 8, 1962, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Kansas City Casualty Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1959, and not inconsistent with the Constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLD:W/W

March 8, 1962



Honorable Warren C. Phelps
Representative, 7th District
Jackson County
1701 Bryant Building
Kansas City, Missouri

Dear Mr. Phelps:

We are in receipt of your request for an opinion on the following matter:

The Kansas City Board of Election Commissioners, under date of December 28, 1961, revised the boundary lines of certain wards in the city. Prior to December 28, 1961, some candidates for ward committeeman and committeewoman filed declarations of candidacy for such offices. The question upon which our opinion is requested is whether the order of the Board of Election Commissioners certifying new boundaries for the wards operates of itself to invalidate such prior declarations of candidacy.

In an opinion dated December 27, 1961, to Honorable George H. Morgan this office ruled that all senatorial and representative districts in Jackson County went out of existence after the 1960 decennial census, and therefore, until new districts were created as provided by law, there was no office in existence for which a candidate could validly seek nomination. The opinion ruled that as a result of the foregoing, declarations of candidacy theretofore filed for such offices were void and of no force and effect.

The premise upon which the Morgan opinion was based is inapplicable to the ward revision in Kansas City. The wards which theretofore existed did not automatically go out of existence as a result of either the census or any canvass of voters.

Honorable Warren C. Phelps March 6, 1962

The board of election commissioners is authorized by Section 117.190 RSMo 1959, to revise the ward boundaries in the circumstances there set forth. However, the wards as theretofore established were actually in existence at the time the declarations of candidacy were filed, and so too, the offices of committeeman and committeewoman for such wards, for which such declarations of candidacy were filed prior to December 28, 1961, were also in existence at the time such declarations were filed. This essential fact distinguishes the situation applicable to filings for ward committeeman and committeewoman from that involved in the Morgan opinion in which the representative and senatorial districts were not in existence at the time of the filings.

Hence, it is our opinion that declarations of candidacy for ward committeeman and committeewoman in Kansas City, filed prior to December 28, 1961, were not automatically rendered ineffective and void because of subsequent changes in ward boundaries. Of course, all such candidates must be qualified voters in the wards as finally constituted.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:BJ

January 17, 1962



Honorable Richard E. McFadin
Prosecuting Attorney
Clay County
Liberty, Missouri

Re: Collector-Levee and Drainage
District Commission

Dear Mr. McFadin:

This is in reply to your request for an opinion dated January 8, 1962, concerning the retention by the collector of commissions accruing to him for collecting Levee and Drainage District taxes.

Prior to 1961 the law was, with certain exceptions, that county collectors were to be compensated for their services by salary only. They were to collect the Levee and Drainage District taxes and pay the commission accruing to their office thereon into the county treasury. This is discussed in two prior opinions of this office, one to your predecessor, Mr. Stephen N. Pratt, dated April 11, 1956, and the other to the Honorable William Harrison Norton of the Missouri House of Representatives dated May 5, 1955, copies of which we enclose herewith.

As noted in your letter of request, the Legislature in 1961 amended Section 50.350, adding subsection 2 to the effect that subsection 1 of same should not be construed to prohibit the retention of the commission allowed to the collector in counties having less than 100,000 inhabitants for collection of the said taxes. You will note that that provision is in connection with subsection 1 of Section 50.350 only and goes only to the construction of subsection 1 of that section.

Your question was does Section 13 of Article VII, Missouri Constitution, apply so as to prevent the collector

Honorable Richard E. McFadin

from retaining these fees as an increase in compensation during his current term. Obviously, since he was previously obligated to collect the commission and turn it over to the county treasury but has now been authorized to keep the commissions during his current term the compensation accruing to him during the term has been increased and is therefore prohibited to him by the constitutional provision. We believe that this sufficiently lays to rest your problem.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

HLM:BJ

CONVICTS:
CITIZENSHIP:
NOTARY PUBLIC:
PAROLE:
CRIMINAL LAW:

A person is disqualified from holding the office of notary public if such person has been convicted of forgery in violation of Section 561.011, RSMo. 1959, and such person has been sentenced to imprisonment and granted a judicial parole on the day of conviction and sentence and if said person has not been finally discharged from such judicial parole.

Opin. No. 74.

February 21, 1962

Honorable George Q. Dawes
Prosecuting Attorney
Iron County
Ironton, Missouri



Dear Mr. Dawes:

This is in answer to your letter of January 12, 1962, and your letter of January 19, 1962, in which you request an opinion of this office. From your two letters we paraphrase your question as follows:

"When a person over the age of 21 years entered a plea of guilty to forgery (Section 561.011, RSMo. 1959) on January 6, 1961, was given a five year sentence and granted a judicial parole on the day of his conviction and sentence and the party involved is presently on said parole, does that person lose his citizenship under Section 561.340, RSMo. 1959, and is he disqualified from holding office as a notary public?"

Section 561.340, RSMo. 1959, referred to in your letter reads as follows:

"Every person who shall be convicted of any felony punishable by the provisions of sections 561.010 to 561.360 shall be incompetent to be sworn as a juror, and forever disqualified from voting at any election, or holding any office of honor, trust or profit within this state."

A judicial parole is authorized by Section 549.060, RSMo. 1959. Section 549.080, RSMo. 1959, provides that when

any person ... shall be convicted of any felony ... and imprisonment in the penitentiary shall be assessed as the punishment therefor and the sentence shall have been pronounced, the court before whom the conviction was had ... may in his discretion, by order of record, parole such person. The termination of this parole is governed by Sections 549.070 and 549.090, RSMo. 1959. The discharge of the person paroled is governed by Section 549.140, RSMo. 1959. Section 549.170, RSMo. 1959, reads as follows:

"Any person who shall receive his final discharge under the provisions of sections 549.060 to 549.180 shall be restored to all the rights and privileges of citizenship."

From a reading of these sections it is clear that a person loses his citizenship when he is convicted of a felony for a violation of Section 561.011, RSMo. 1959, and is sentenced to imprisonment in the penitentiary, irrespective of whether he is thereafter granted a judicial parole; and it is also clear that the person is not restored to the rights and privileges of citizenship at least until he has been finally discharged from the judicial parole.

Under the facts presented in your opinion request the party involved has not been finally discharged from parole and he has therefore not been restored to his citizenship. He is therefore disqualified from holding any office of honor, trust, or profit within this state.

The office of notary public is governed by Chapter 486 of the Missouri Revised Statutes of 1959. A notary public is appointed and commissioned by the Governor under Section 486.010, RSMo. 1959. The powers and duties of a notary public are specified in Section 486.020, and a reading of this section clearly indicates that the office is one of great trust by virtue of the very nature of the powers and duties conferred on a notary public. Fees for a notary public are specified by Section 486.090, RSMo. 1959, and since a notary public is entitled to these fees, it is obvious that the office of notary public is an office of profit. Since the office of notary public is an office of trust and profit within the State of Missouri, the party involved and described in your opinion request is disqualified from holding such office.

In your opinion request you inquired further as to the proper remedy to recover the commission as a notary public from the party involved. We suggest that an amicable recovery of the commission be attempted, and if a voluntary surrender of the commission as a notary public is not feasible, we can then advise as to the appropriate remedy for the recovery or recall of the commission.

CONCLUSION

A person is disqualified from holding the office of notary public when such person has been convicted of forgery in violation of Section 561.011, RSMo. 1959, and such person has been sentenced to imprisonment even though such person was granted a judicial parole on the day of conviction and sentence, if said person has not been finally discharged from such judicial parole.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

WW:mc

March 8, 1962



Honorable George H. Morgan
Member
Missouri House of Representatives
12312 South 71 Highway
Grandview, Missouri

Dear Mr. Morgan:

Concerning your letter of January 11 and our letter of January 17, 1962, respecting an opinion concerning the Kansas City Police Department, we have done additional research into the problem of their conducting spot checks for city auto licenses and have also been able to develop a minimum amount of factual data concerning the manner in which these checks are conducted.

As is quite obvious, such spot checks are bound to result in some inconvenience and delay in flow of traffic. However, our courts have come to regard the use of roads and highways and city streets as a privilege and not as a matter of right. Likewise, the granting of a license in connection with same is also regarded as a privilege and not as a contract or franchise. Thus, some reasonable inspection of vehicles using public ways is necessary in order that the city may enforce its licensing provisions as set forth in its ordinances "Article XXVII, Section 58.2200, Section 58.2220, etc."

The state statutes pertaining to the power of arrest in the Kansas City Police Department (Chapter 84) would seem to cover this procedure and would certainly permit arrests where violations are found by virtue of such spot checks, there being no unlawful search and seizure involved in that the ordinance requires that the license sticker be displayed in plain view.

The only type of organized check of licenses of which we can obtain any information is as follows: A police car is placed some distance back of an electric signal controlled intersection. This police car displays a large sign indicating that a vehicle license inspection check point is ahead. A police officer is stationed at the intersection who checks to determine which vehicles are displaying a current license sticker. The operator of any vehicle not displaying a current license sticker is either given a traffic ticket or is permitted to show that for one reason or another he does not come within the ordinance requiring such licenses.

We feel that such a procedure as set forth above is reasonably designed to enforce the ordinance previously referred to.

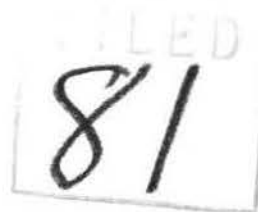
Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLM lc

Opinion No. 81, answered by letter.

January 18, 1962



Honorable Anthony D. Pickrell
5th District, Jackson County
5415 East 27th Street Terrace
Kansas City, Missouri

Dear Mr. Pickrell:

This is in response to your letter of January 16, 1962, requesting an opinion on several questions put to you concerning whether a registered pharmacist must be present when prescriptions are filled.

In a recent opinion, this office construed Section 338.240, RSMo 1959, as requiring the presence of a licensed pharmacist at any time that a prescription is compounded or sold. A copy of that opinion, issued at the request of Honorable George Allen under date of December 8, 1961, is attached herewith.

The letter that accompanied your request makes specific reference to the provisions found in Section 338.010, RSMo 1959, which apparently permit someone other than a registered pharmacist to compound prescriptions "as an aid to or under the direct supervision of" a licensed pharmacist.

We do not believe that it was the intent of Section 338.010 to create a separate status somewhere between layman and licensed pharmacist which would permit unlicensed "aids" to fill physicians' prescriptions. On the contrary, we believe that when Section 338.010 is read so as to harmonize with the obvious intent of Section 338.240 (4), it simply permits an unlicensed person, in the presence of a qualified pharmacist, to compound a prescription at the latter's direction and under his actual supervision.

Although there are no recent judicial pronouncements on this subject, we are bolstered in our view by an early decision of the St. Louis Court of Appeals which said, in construing a similar statute:

Honorable Anthony D. Pickrell

"* * * In fact, the aid in filling a prescription of a physician, under supervision of the pharmacist, does not in fact, or in legal effect, make a sale of the drugs or liquors purchased. His act is the act of the pharmacist. He exercises no independent judgment of his own in compounding these prescriptions, but is the mere instrument or hand through which it is compounded by the pharmacist, and the pharmacist and not the aid is the responsible party in the transaction. * * *"

State v. Hammack (1902), 93 Mo. App. 521, 528.

Therefore, since both of your questions are premised on the absence of a licensed pharmacist at the time the prescription is filled, the answers would necessarily be in the negative. That is, a person not licensed as a pharmacist may compound prescriptions, but only in the presence and under the supervision of a licensed pharmacist.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

AJS:jh
Enc.

MARRIAGES:
MINISTERS:
MARRIAGE LICENSES:

A marriage may not be solemnized in Missouri unless a license for such has been obtained from a proper official in this state; marriages solemnized in Missouri on the basis of a license issued in another state are invalid.

(No. 82)

February 28, 1962

Honorable Frederick E. Steck
Prosecuting Attorney
Scott County
Sikeston, Missouri



Dear Mr. Steck:

We are in receipt of your request for an opinion of this office which reads as follows:

"Is it lawful for a minister to marry a couple who obtained their marriage license in another State in Missouri?"

"Also, I would like to know if a marriage performed by a qualified minister in the State of Missouri is valid if the man and woman obtained their marriage license in another State other than Missouri?"

We direct your attention to the first question contained in your request - whether a marriage may be solemnized on the basis of a marriage license in Missouri obtained by the parties involved in another state.

Section 451.040, RSMo 1959, insofar as it is material reads as follows:

"Previous to any marriage in this state, a license for that purpose shall be obtained from the officer authorized

Honorable Frederick E. Steck

to issue the same, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages."

Section 451.080, RSMo 1959, insofar as it is pertinent, reads:

"The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same * * *"

A reading of these statutes reveals that the license to be obtained prior to marriage in Missouri must be issued by an officer authorized to do so, and the officers so authorized are the recorders of the various counties of the state and the City of St. Louis. The required license, therefore, must be one issued in Missouri. The answer to your first question is in the negative. In this connection, we wish to call your attention to Section 451.120, RSMo 1959, which states in part:

"Any person who shall solemnize any marriage wherein the parties have not obtained a license, as provided by this chapter . . . shall be deemed guilty of a misdemeanor . . ."

We turn now to a consideration of your second question. Assuming that a marriage is solemnized by a person authorized to do so under Missouri law, and further assuming that the parties involved here obtained their license in another state, what is the legal status of the marriage?

Your attention is again directed to Section 451.040, paragraph one, particularly to the words, "no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained . . ."

As stated above, the "license" which parties seeking to be married must obtain is one issued by a recorder of one of the

Honorable Frederick E. Steck

various counties in the state or of the City of St. Louis. The last quoted part of Section 451.040 therefore makes any marriage solemnized in Missouri on the basis of a marriage license procured in another state invalid.

CONCLUSION

It is the opinion of this office that a marriage may not be solemnized in Missouri unless a license for such has been obtained from a proper official in this state; it is further our opinion that marriages solemnized in Missouri on the basis of a license issued in another state are invalid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Ben Ely, Jr.

Yours very truly,

Thomas F. Eagleton
Attorney General

BE:ms

ELECTIONS: Voters in the school election in the School
SCHOOL DISTRICTS: District of St. Joseph may not vote at a
VOTERS: regular polling place for the regular
POLLING PLACE: municipal election in the City of St. Joseph,
which polling place is outside the limits of
the School District of St. Joseph.

Opin. No. 85

March 5, 1962

FILED
85

Honorable Dan Hale
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Hale:

This is in reply to your letter of January 17, 1962, in which you requested an official opinion from this office, and your supplemental letter of February 8, 1962, which supplemental letter reads as follows:

"The School District of the City of St. Joseph is governed by the statutes relating to School Districts in cities of 75,000 to 700,000. Some of these statutes are found beginning at Sec. 165.377 to Sec. 165.550, also Sec. 111.255.

"At the oncoming City Election to be held on April 3rd, two school directors for the School District for the City of St. Joseph are to be elected. The city will furnish the polling facilities.

"The question that we have is as follows: we have a precinct which is all inside the city limits of the City of St. Joseph and partially outside of the limits of the School District. The polling place has always been the Spring Garden School. The Spring Garden School is outside of the School District and inside the city limits.

"Can the people who live inside the School District vote for the school directors at the polling place which is Spring Garden School which is geographically located outside of the School District?"

The general school law governing the place of school elections is found in Section 165.330, RSMo. 1959, a portion of which reads as follows:

"The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate. . . ." (Emphasis supplied.)

This general law requires that the polling places be within the school district, and if it were applicable to the St. Joseph School District, it would not be permissible to have the Spring Garden School as the polling place for the school election.

As stated in your letter, the School District of the City of St. Joseph is governed by Sections 165.377 to 165.553. Section 165.377 reads, in part, as follows:

"All school districts in this state which contain all, or the greater part of, a city having a population of more than seventy-five thousand and less than seven hundred thousand inhabitants . . . shall be a body corporate . . . and shall possess the same corporate powers and be governed by the same general laws as other school districts, except as herein provided. * * *" (Emphasis supplied.)

Under this section, the general school laws would govern unless there was a specific provision applicable to the St. Joseph School District which excepted it from this section.

Section 165.383, RSMo. 1959, provides, in part, as follows:

" * * * And provided further, that if any city, in which there is or may hereafter be located wholly or in part a school district to which sections 165.377 to 165.553 apply, shall hold its election for municipal officers on a date other than the first Tuesday after the first Monday in April, then such election for school directors in the year in which the city shall hold its said election shall be held at the same time and places as the election for municipal officers, * * *."

Section 165.383 is an exception from the general laws for St. Joseph if the election is held on a date other than the first Tuesday after the first Monday in April, or if the school election is held at a different time than the municipal election. Here the facts are that both elections are to be held on April 3, 1962, which is the first Tuesday after the first Monday in April, they are the regular elections, and Section 165.383 does not provide an exception from the general laws for this election.

Section 165.465 cannot be an exception for St. Joseph because that section deals only with a school district having a population of more than two hundred thousand and therefore cannot apply to St. Joseph.

As it read in 1949, Section 165.467 contained the language, "... and the election of directors and the submission of such questions, except in the cases of special elections provided for in sections 165.473, 165.487, 165.490 and 165.497, shall be held at the same time and places as the election for municipal officers...."

This language would have been a clear exception under the facts of this situation, but this language was deleted from the section when amended by Laws of 1951, page 528, Section 2, effective July 29, 1952. There is nothing in the present section 165.467 which could constitute an exception because it does not specify that the school election shall be held at the same time and place as the municipal election.

Section 165.473 is not applicable here because it deals only with special elections, and the election in question here is the regular election.

Section 111.255, RSMo. 1959, reads as follows:

"Notwithstanding any other provisions of law, whenever any primary, general or special elections, or elections held by any school district, fire protection district, sewer district, municipalities, or other political subdivision of the state, are held upon the same day in any political subdivision, one polling place for the several elections in each precinct, consolidated precinct or district in the political subdivision shall whenever feasible be designated by the county clerk, board of election commissioners, or other proper election official, having authority over general elections in the political subdivision and the election officials in the polling places shall be designated by the county clerk, board of election commissioners or other proper election official and shall be compensated for one election only. Any person failing or refusing to comply with the provisions of this section is guilty of a misdemeanor."

This section (111.255) of the general election laws is not sufficient in this case because it only provides for one

polling place for the several elections in each precinct whenever feasible. It presupposes that the precincts or districts coincide, and it in no way authorizes a polling place outside of a precinct or district.

The general laws on elections, in Section 111.060, RSMo. 1959, provides: "Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides." This strengthens the proposition that voters in a school election may not vote at a polling place outside the limits of the school district.

The facts show that the election which is to be held in the City of St. Joseph on April 3, 1962, is the regular biennial election, held on the first Tuesday after the first Monday in April. This is the regular election for both the City of St. Joseph and the School District. Since the St. Joseph School District is governed by the same general laws as other school districts; such general law requires the polling place to be within the district; and we are unable to find any exception for this regular election; it necessarily follows that a polling place which is outside of the school district is not proper and the residents of the school district could not vote in a school election at such a polling place.

CONCLUSION

It is the opinion of this office that the voters in the school election in the School District of St. Joseph may not vote at a regular polling place for the regular municipal election in the City of St. Joseph, which polling place is outside the limits of the School District of St. Joseph.

This opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

WW;mc



December 27, 1962

Honorable Phil Hauck
Prosecuting Attorney
Grundy County
Trenton, Missouri

Dear Mr. Hauck:

This refers to your letter of December 13, 1962, with reference to your earlier request for an opinion with respect to the relocation of a portion of State Highway No. 6 and the proposed abandonment of the old right-of-way, including certain bridges.

We do not believe that we should undertake to furnish a comprehensive official opinion concerning the power of the State Highway Commission to abandon the old right-of-way. However, we suggest that, basically, the answer lies in the constitutional grant to the State Highway Commission of exceedingly broad authority to relocate all state highways. This is found in the last sentence of Article IV, Section 29, Constitution of Missouri, which reads as follows:

"It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law."

Thus, the Commission's authority to relocate state highways (and, in so doing, to abandon portions of old

rights-of-way) is not dependent upon the statutory provisions mentioned in your first letter, namely, Section 227.250, RSMo 1959, concerning temporary closings, and Sections 227.260 and 227.270, concerning relocation of undated portions of highways. In this connection, it may be noted that, notwithstanding certain language in Section 227.260, it was construed shortly after its enactment as not being the exclusive basis for relocation of state highways, even under the then existing constitutional and statutory provisions (State ex rel. State Highway Commission v. Gordon, Mo. Sup., 36 S.W.2d 105).

With respect to Article IV, Section 31, Constitution of Missouri, we agree that, by its terms, this section, as stated in your first letter, is "merely permissive"; and it is not our understanding, from the information furnished by you, that the State Highway Commission in fact has contended that it has authority under this or any other constitutional or statutory provision to compel your county to assume the maintenance of the old right-of-way.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

February 6, 1962

FILED
89

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. Burrell:

You have requested the views of this office concerning the necessity of holding a public hearing under the provisions of Section 22.050, RSMo 1959, before the county court may establish representative districts after receipt of official certification from the Secretary of State of the number of representatives to which your county is entitled.

We enclose opinions of this office to Paul C. Calcaterra dated August 29, 1951, and to George H. Morgan, dated December 27, 1961, which rule that after each decennial census the former representative districts go out of existence and that it is the duty of the county court (or Board of Election Commissioners) to establish new districts. That such duty is mandatory is clear under the provisions of Section 3, Article III of the Constitution and Section 22.050 which implements the constitutional provision. Section 3 of Article III of the constitution provides in part:

"When any county is entitled to more than one representative the county court * * * shall divide the county into districts * * *."

The word "when", as used in this provision of the Constitution, means "at the time that". State ex rel Major v. Patterson, 229 Mo. 373, 129 SW 888, 1.c. 891. And since Section 10, Article III of the Constitution provides that the last decennial census shall be used in apportioning representatives, this can mean only that

at the time it appears from the last decennial census the county is entitled to more than one representative, it then becomes the duty of the county court to divide the county into representative districts based upon the population figures contained in such census.

Section 22.050 expressly provides that within 60 days after being officially informed of the number of representatives to which the county is entitled, the county court shall divide the county into representative districts.

The further provision of Section 22.050 authorizing the county court to alter districts one time after each decennial census after a public hearing relates only to a change in the boundary lines of the districts once they have been established and does not refer to the original creation of such districts. This because the duty to divide the county into districts must be complied with in all events, not because of a finding that "public convenience" so requires, but because our Constitution itself makes such requirement. On the other hand, once the districts have been established, any alteration or change therein can be made only upon a finding by the county court, after a public hearing, that "public convenience" requires such alteration. Absent a statute such as Section 22.050 authorizing the county court to make an alteration of the boundaries of a district and prescribing the conditions therefor, the county court would have no authority to make any alteration in a district which it had theretofore established pursuant to the constitutional mandate. This is made clear by our Supreme Court in the Patterson case, in which the court stated, 129 SW 1.c. 892:

"* * *In other words, the Constitution contemplates that these districts shall be established at decennial periods, but has reserved a power in the Legislature to provide by law for a change in the same. This upon the theory that there is a difference between dividing a county into districts, and afterward changing the boundary lines of those districts. That this power is reserved to the Legislature is further emphasized by the fact that section 9 does not, within itself, undertake to prescribe the conditions under which the changes or alterations should be made. Nor does it undertake to prescribe the method of determining the requisites for

such changes. These things were evidently left for legislative determination, * * *

As will appear from the foregoing, it is the view of this office that no public hearing is necessary before the county court establishes representative districts after the decennial census, and that the failure to hold such a hearing before establishing such representative districts after being informed by the Secretary of State of the necessity therefor does not invalidate the districts so created.

Yours truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

MENTAL DISEASES: 1. Division of Mental Diseases authorized to transfer patient from State Hospital to the Veterans Administration when authorized by Director of Division of Mental Diseases and to pay expenses incurred in making transfer.
STATE HOSPITAL: 2. Employees of Division of Mental Diseases have no authority to return a patient from another state who has escaped from hospital in this state.

Opinion No. 90 (1962)
(Mansur)

July 10, 1962



Honorable George A. Ulett, M. D.
Acting Director
Division of Mental Diseases
722 Jefferson Street,
Jefferson City, Missouri

Dear Dr. Ulett:

In your letter of January 17, 1962, you requested an opinion from this office as follows:

"From time to time we are confronted with the legality of an expenditure for transporting mental hospital patients to other states. We are fully cognizant of the legality of such expense permitted in Section 202.880 and in Senate Bill No. 54, passed by the 71st General Assembly. However, we would like an official opinion on the payment of expenditures not covered by the above two laws as follows:

"1. Transporting patients to Veterans Administration facilities in other states.

"2. Returning from another state a patient who has escaped from one of our state mental hospitals or schools."

Senate Bill 54 to which you refer is now Section 202.875, RSMo Cum Supp. 1961.

I agree with you that Section 202.880 has no application to the questions you have submitted.

Section 202.823, RSMo 1959, provides for the Division of Mental Diseases to transfer or authorize a transfer of a voluntary patient from one state hospital to another state hospital for care and treatment. It further provides:

Honorable George A. Ulett, M. D.

"2. Upon receipt of a certificate of an agency of the United States that facilities are available for the care or treatment of any individual heretofore ordered hospitalized pursuant to law or hereafter pursuant to section 202.807 in any hospital for care or treatment of the mentally ill and that such individual is eligible for care or treatment in a hospital or institution of such agency, the division may cause his transfer to such agency of the United States for hospitalization. Upon effecting any such transfer, the court ordering hospitalization, the legal guardian, spouse, and parents, or if none be known, his nearest known relative or friend shall be notified thereof immediately by the division. No person shall be transferred to an agency of the United States if he is confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of mental illness unless prior to transfer the court originally ordering confinement of such person enters an order for the transfer after appropriate motion and hearing. Any person transferred to an agency of the United States shall be deemed to be hospitalized by such agency pursuant to the original order of hospitalization." (Emphasis supplied)

Under the above section express authority is given the Division of Mental Diseases, under certain conditions as provided in said statute, to transfer a patient from a state hospital to an agency of the United States for care and treatment. It must be observed this statute states that the Division may cause this transfer.

In Webster's New International Dictionary, Second Edition, the word "cause" is defined as "that which occasions or effects a result; the necessary antecedent of an effect; that which determines the condition or existence of a thing, esp. that which determines its change from one form to another."

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This statute is silent as to the location of the hospital or agency of the federal government to which the patient may be transferred. It does not restrict the transfer to a hospital or agency within this state.

In *State ex rel Bradshaw vs. Hackmann*, 208 S. W. 445, the Supreme Court was considering the expense account incurred by the State Warehouse Commissioner in attending a meeting in Washington, D. C., which expense account the State Auditor refused to approve. After stating that no officer in this state can pay out the money of the state except pursuant to statutory authority authorizing and warranting such payment, the court stated, 1. c. 448:

"The only exception to this rule (and it is not in fact an exception) is:

"That whenever a duty, or power, is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties effectual, is conferred by implication." *State ex rel. Bybee v. Hackmann*, *supra*."

The court further stated, 1. c. 449:

"* * * It so occurs here that the statutory duties of the Warehouse Commissioner, as at present defined, are such as in the very nature thereof cannot entail travel outside of the state. If, however, the statutory duties of an officer of this state be such as require, or entail in their proper performance, travel beyond the borders of this state, then such travel is as much a necessary expense, for which the state would be liable, as is travel within the state. *State ex rel. Lamkin v. Hackmann*, 204 S. W. 513, not yet officially reported."

We believe that under the above statute (Section 202.823) the Division of Mental Diseases is authorized and has authority to transfer a patient from a state hospital to a veterans

Honorable George A. Ulett, M. D.

hospital either within or without this state, and expenses incurred would be a legitimate expenditure of public funds by the Division of Mental Diseases.

It must be observed that under this statute whether or not a patient is to be transferred is a discretionary matter with the Director of the Division of Mental Diseases. The superintendents of the individual state hospitals do not have such authority and are not authorized to transfer a patient without prior approval of the director.

In your second question you inquire about the legality of paying expenses incurred in returning from another state a mental patient who has escaped from a state mental hospital in this state. You have informed me this question is directed primarily to the expenses incurred by employees of the state hospital in returning such a patient.

Section 202.430, RSMo 1959, provides that if an insane patient escapes from any state hospital and returns to the county from which he was committed it shall be the duty of the sheriff of said county, upon being notified by the superintendent, to apprehend such patient and return him to the hospital from which he escaped. It further provides for the hospital to pay the sheriff the same fees for his services in returning the patient as are allowed to the sheriff for executing a commitment.

Section 202.440, RSMo 1959, provides certain fees to be paid the sheriff in taking a patient to the hospital or removing one therefrom upon the warrant issued by the clerk of the court that committed the patient to the hospital. This section would govern the fees that are to be allowed the sheriff under Section 202.430, supra.

Sections 202.430 and 202.440, supra, govern the return of patients who escape from state mental hospitals and are apprehended within the state.

Section 31.060, RSMo 1959, provides for the establishment of a fund with each of the state hospitals which is to be used as a revolving fund to meet incidental expenses and for the costs incurred in returning non-resident patients to their state of residence.

Honorable George A. Ulett, M. D.

Section 202.875, RSMo Cum. Supp. 1961, authorizes the Division of Mental Diseases to return a non-resident patient to his state of residence after proper arrangements have been made with the state of his residence. It also provides for the payment of the costs of transporting a non-resident of this state to the state of his residence.

Sections 31.060 and 202.875 are limited to the return of non-resident patients in this state to the state of their residence. Neither section has any application to the return of a patient from another state to this state.

Under Section 202.875, supra, the Director of the Division of Mental Diseases may enter into reciprocal agreements with other states or political subdivisions thereof for the transfer of patients to the state of their residence. Although such an agreement might provide that the other state would pay the cost of returning a mental patient to this state in return for this state agreeing to pay the cost of transportation of a patient to such other state, such an agreement could not provide for this state to pay the cost of returning a patient to this state. The only costs that can be allowed to be paid by this state under this statute are the costs in returning a patient from this state to another state. Therefore, this section has no application to the facts now under consideration.

There is no statute in this state which authorizes an employee of the Division of Mental Diseases to travel to another state for the purpose of returning to this state a mental patient who has escaped to another state from a mental hospital in this state.

The State Division of Mental Diseases is created by statute and has only such authority as expressly given by statute and such implied authority as is necessary to carry out the express authority granted. *Soars vs. Soars-Lovelace, Inc.*, 346 Mo. 710, 142 S. W. 2d 866; *Bradford vs. Phelps County*, 357 Mo. 830, 210 S. W. 2d 996. Since there is no express statutory authority authorizing the employees of the Division of Mental Diseases to go outside this state for the purpose of returning to this state a resident of this state who has escaped from a mental hospital in this state, expenses incurred by an employee in doing so cannot be allowed as a valid expenditure of state funds.

CONCLUSION

1. The State Division of Mental Diseases is authorized

Honorable George A. Ulett, M. D.

under Section 202.823, RSMo 1959, to transfer involuntary patients committed to the State Division of Mental Diseases to a Veterans Administration facility for care and treatment upon receipt of a certification from such facility that the patient is eligible for admission and the expenses incurred thereby may be paid by the Division of Mental Diseases as an administrative expense if such transfer has been directed or authorized by the Director.

2. Employees of the State Division of Mental Diseases are not authorized to go to another state and return to this state a patient who has escaped from a mental hospital in this state, and costs incurred in doing so cannot be allowed as a valid expenditure of state funds.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

MM:BJ

(Opinion request No. 93 ('62) answered by this letter.)

February 13, 1962



Honorable F. Neil Aschemeyer
Member, House of Representatives
39 Enfield Road
Olivette 32, Missouri

Dear Neil:

This is in response to your letter dated January 19, 1962, in which you enclosed a copy of Form SR-3 being used by the Safety Responsibility Unit of the Department of Revenue. As you well know, the Director of Revenue is responsible for determining the amount and form of security required by law to be deposited with him when a reportable accident occurs. To guide him in this determination, the Director has devised several forms which, when once filled out, will give him the information needed for making an adequate decision. In the past there have been times when the initial accident report has not contained adequate information to properly apprise the Director of the extent of personal injury sustained by the individual filling out the report. As a consequence, the Director has found it difficult to properly fix the amount of security required to be deposited by the operator of the other motor vehicle involved in the accident. This led to the establishment of Form SR-3, the Personal Injury Report.

In your letter you raise several questions concerning this report. Since it is one of the functions of this office to extend legal advice and counsel to the Director of Revenue, I naturally am very appreciative of the comments set forth in

Hon. F. Neil Aschemeyer

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February 13, 1962

your letter. As a result of your observations I have suggested several changes in Form SR-3. The Director has followed my suggestions. A copy of the revised form is enclosed.

Thank you for taking the time to bring these matters to my attention. I am certain that this change will result in a better and more proper administration of the Safety Responsibility law.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enclosure

BGB:mc

March 6, 1962



Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Mr. Boulware:

This refers to your letters of January 22 and 30, 1962, requesting an opinion concerning the proposed sale by the county court of your county of a portion of the site of the County Infirmary and the proposed purchase of other land which is now being used as part of an airplane landing field.

Section 49.270, RSMo 1959, mentioned in your letters, provides the authority for the county court to sell the land which it regards as being no longer needed for county purposes. In this connection we are enclosing copies of prior opinions of this office furnished to Charles E. Murrell, Jr., on March 19, 1951 and to J. R. Gideon, on February 18, 1949.

Sections 305.180 to 305.220, RSMo 1959, authorize counties to establish airports and airplane landing fields and to purchase land for this purpose. However, we should point out that we have doubt whether the proposed purchase of land described in your letters is authorized by these statutory provisions under the apparent present facts.

We have not been advised that the county court of your county has taken any action to establish and operate a county airport or landing field as contemplated by such statutory provisions. Rather, there is some indication in your letters that the present landing field is purely a private venture, with the county having no connection with the landing field except that a lessee has seen fit to use for this purpose some land which he has leased from the county; and it appears that the additional land might properly be regarded as

Honorable Rolin T. Boulware

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being in furtherance of this private venture, rather than for authorized county purposes, under the present facts.

On the other hand, it appears that the factual situation possibly could be changed so that the landing field would be one established and operated as authorized by Sections 305.180 to 305.220. In this connection, we note that Section 305.210 provides that a county "may by franchise or contract authorize others, in whole or in part, to construct, equip, maintain, and operate" an airport or landing field established by the county.

We trust that this letter will be of assistance to you in disposing of this problem.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

2 enclosures

March 9, 1962



Honorable Robert A. Young
Member, Missouri House of Representatives
First District, St. Louis County
3500 Adie Road
St. Ann, Missouri

Dear Mr. Young:

This letter of advice is addressed to the problems reflected by the questions posed by the Florissant Committee For Independent Freeholder Candidates and submitted with your letter of January 20, 1961.

Evidence at hand discloses that the City of Florissant, Missouri, is a special charter city, having been incorporated by special act of the legislature in 1857, and that such city desires to adopt a charter form of government under constitutional authorization found in Article VI, Section 19, Missouri's Constitution of 1945.

Information given to this office discloses that over thirty persons were nominated for the thirteen charter commission posts voted upon at the election held in Florissant on December 19, 1961. Article VI, Section 19, Missouri's Constitution of 1945, authorizing such election, specifically provides that "the thirteen candidates receiving the highest number of votes shall constitute the commission". The electorate was endeavoring to fill thirteen separate positions on the charter commission and the election of twelve of those members must be conceded because each of them had more votes than any other candidate. Two candidates were in thirteenth position because of a tie vote, and we must take notice of a rule stated in the following text from 29 C.J.S., Elections, Section 244:

"Where the vote results in a tie, and no provision is made by law for determining who shall be declared elected in such case, there is no election."

Article VI, Section 19, Missouri's Constitution of 1945, requires that the charter commission posts be filled in the initial instance, by election, and contains no provision directing how a tie vote is to be resolved. We have not found any statutory directive disclosing how such tie vote is to be treated.

In the case of *State ex inf. Crow, Attorney General v. Kramer*, 150 Mo. 89, the Supreme Court was considering the affect of a tie vote in an election for county clerk, and spoke as follows at 150 Mo. 89, l.c. 100, 101:

"The fact that provision was made as to ties for sheriff and coroner, and no such or other provision made for ties for county clerks, is a very conclusive demonstration that the framers of the constitutional amendment did not intend that ties for county clerks should be determined in any manner by the county court or any one else, for if they had so intended they would have said so in express terms as they did respecting sheriffs. As they did not do so, it is plain that instead of its being an oversight, it was their intention to require the people to elect, and if there was a tie, there was no election, and the legal consequences ensued." (Underlining supplied)

The principal laid down in *State v. Kramer*, supra, is to be applied to our factual situation insofar as it involves the thirteenth position to be filled on the charter commission and is not to be applied to defeat the election of twelve members of the commission whose vote margin was certain, and not subject to challenge by any of the other nominees running for seats on the commission.

A close analogy to our factual situation is found in the case of *Beeler v. Loock*, 135 S.W. 2d 644, where the Court of Civil Appeals of Texas was reviewing an election contest arising over the election of school trustees. The facts in such case disclosed that there were fourteen candidates for the seven places to be filled on the board of trustees being elected for the first time. Each of five candidates received vote margins over their opponents which ruled out any question of their right to become trustees. Three candidates received the same number of votes, or 113 each. In such election contest a retabulation disclosed that seven persons were actually elected to the board of trustees but the appellate court did announce this principal at 135 S.W. 2d 644, l.c. 647:

"In the present instance, however, the fact that candidates might receive an equal number of votes, there being seven places, and not merely one, to fill, could not result in the election being void merely because two or more may have received an equal number of votes."

The charter commission to be established under authority found in Article VI, Section 19, Missouri's Constitution of 1945, is to be composed of the "thirteen candidates receiving the highest number of votes". The case of State ex inf. Crow, Attorney General v. Towns, 153 Mo. 91, 1. c. 109, treats the word "elected" in the following language:

"In State ex rel. v. Kramer, 150 Mo. 89, it was expressly held that where the Constitution provides that an officer shall be elected, it meant the act of choosing, performed by the qualified electors, and that where the electors failed to make a choice, no appointment could be made to the office unless expressly authorized by the Constitution."

In view of the interpretation of the word "elected" as spelled out in the foregoing quotation from State v. Towns, supra, it must reasonably be concluded that twelve of the thirteen members to compose the charter commission were chosen and elected on December 19, 1961, and that the only vacancy on the commission results from the failure to choose and elect the thirteenth member. In the absence of a directive as to how this single vacancy is to be filled we conclude that it must be filled by another election.

Having answered the first question posed by the Florissant Committee For Independent Freeholder Candidates, we next outline answers to questions numbered 2, 3 and 4, as follows:

2. While the election of twelve members of the Commission on December 19, 1961 is not subject to challenge, the formal functioning of the Commission must await the election of its thirteenth member.

3. a and b. A special election should be held at the earliest convenient date to fill the thirteenth position on the Commission, giving due consideration to the time required for ordinance passage and the mandatory period of thirty days preceding the election after which no nominating petitions may be filed.

c. There is not sufficient time, in our belief, to hold the election on April 3, 1962. However, it could be held at the special bond issue election in May, 1962.

d. Scheduling the special election to fill the vacancy now existing on the Commission for May, 1962, would not involve an unreasonable delay in such matter.

e. No runoff election is to be conducted between the parties who tied for the thirteenth position on the Commission.

f. Since no runoff is permitted, this question requires no answer.

g. Any and all persons seeking the thirteenth place on the Commission must file new nominating petitions, and this applies to the two persons who tied at the election held December 19, 1961.

4. a and b. A charter framed by the Commission must be submitted to the electorate within one year after the Charter Commission has been fully formed by election of its thirteenth member, and not less than 30 days subsequent to completion of the charter.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CEMETERIES:

CEMETERY ENDOWED CARE
FUND LAW:

RELIGIOUS ORGANIZATIONS:

Cemetery Endowed Care Fund Law (Sec. 214.270-214.410, RSMo 1961 Supp.) applies to a religious organization operating a cemetery and which makes occasional sales to persons who are neither members of the organization nor in the immediate families of such members. The fact that the purchasers may be of the same religious faith as the members is wholly irrelevant, inasmuch as the statute contains no such exception.

March 30, 1962

Opinion No. 99 (1962)

Honorable William A. Collet
Prosecuting Attorney
Jackson County
415 East Twelfth Street
Kansas City 6, Missouri

Dear Mr. Collet:

This is in response to your request for an opinion dated January 25, 1962, as follows:

"A question has arisen concerning the application of the Cemetery Endowed Care Fund Law Section 214.270(1) to religious organizations which sell burial spaces in their cemeteries primarily to their members but which make occasional sales to non-members of the same religious faith.

"Would you please advise whether the fact that those religious organizations make occasional sales of burial places to non-members of the particular organization but restrict sales to members of the same religious faith would make such organization subject to said act in light of the definition contained in Section 214.270(1)."

The specific section of the law in question, Section 214.270(1), RSMo 1961 Supp., reads as follows:

"'Cemetery' shall include cemeteries, mausoleums, garden crypts, columbariums, crematoriums and all other places held for burial purposes for sale to the public, but shall not include any of the foregoing held or operated by the

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Honorable William A. Collet

state or federal government or any political subdivision thereof, any incorporated city or town, or any religious organization or fraternal society holding the same for sale solely to members and their immediate families;"

In this state there are but two classes of cemeteries, public and private. *Wooldridge vs. Smith*, 243 Mo. 190, 1.c. 198, 147 S.W. 1019, and *Mount vs. Yount*, 220 Mo. App. 187, 281 S.W. 119, 120. And see *City of Caruthersville vs. Faris*, 237 Mo. App. 605, 146 S.W. 2d 80, 84. A private cemetery is one such as is described in Section 214.090, RSMo 1959, and is for the use of the descendants of a single family. A cemetery such as is described in your letter is a public and not a private cemetery.

Obviously, the Cemetery Endowed Care Fund Law (Sections 214.270 to 214.410, RSMo 1961 Supp.) has no application at all to private cemeteries, and is intended to apply to public cemeteries. However, Section 214.270(1) excepts from the operation of the law certain cemeteries which would otherwise come within the scope thereof. Among these exceptions is the one here involved: religious organizations holding the same for sale solely to members and their immediate families. The word "solely" is controlling and so definite as to require no construction. It can mean as here used only "exclusively" and "without exception".

CONCLUSION

The Cemetery Endowed Care Fund Law (Sec. 214.270 - 214.410, RSMo 1961 Supp.) applies to a religious organization operating a cemetery and which makes occasional sales to persons who are neither members of the organization nor in the immediate families of such members. The fact that the purchasers may be of the same religious faith as the members is wholly irrelevant, inasmuch as the statute contains no such exception.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Howard L. McFadden.

Yours very truly,

HLM:BJ

THOMAS F. EAGLETON
Attorney General

February 19, 1962

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Honorable Earl R. Blackwell
State Senator, 22nd District
Hillsboro, Missouri

Dear Senator Blackwell:

We are in receipt of your letter of recent date asking whether the county clerk of a county which has adopted local option county voter registration under Chapter 114, RSMo 1959, can, for purposes of initial voter registration, designate additional places of registry in each township in the county with a deputy county clerk in charge of each.

Section 114.080, RSMo 1959, establishes the office of the county clerk as the place of voter registration in counties adopting local option registration. Section 114.090 RSMo 1959, authorizes the county clerk of such a county, for purposes of initial voter registration, to designate additional places of registry in the county. It reads as follows:

"For the initial registration, the county clerk may designate additional places of registry in the county, but these places of registry shall not exceed more than one in each township in the county in addition to the office of the clerk of any city, town or village who is deputized by the county clerk under this chapter. If any additional place of registry is established, the county clerk shall place a deputy in charge thereof."

It will be seen that the number of additional places of registry which may be established is limited to one per township

Honorable Earl R. Blackwell

but if the clerk of a city, town or village is appointed deputy registration officer, as authorized by Section 114.100, subsection 2, RSMo 1959, the township in which such clerk holds office is still entitled to one additional place of registry. However, in a telephone conversation on February 5, 1962, you advised us that you are primarily concerned with the registration of voters in the northern part of your county, which, although it is quite populous, contains no incorporated areas and hence no city, town or village clerk for the county clerk to deputize.

It should also be noted that the above quoted section requires that county clerks place a deputy in charge of each additional place of registry. The clerk may use, for this purpose, any of the deputies provided for in Section 114.100, RSMo 1959.

Under the authority of the above quoted section, we believe that the county clerk of Jefferson County can create one additional place of registry in each township in his county for the purpose of initial voter registration and that upon such creation he must place a deputy in charge thereof.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EE:ms

CITIES, TOWNS & VILLAGES:	3rd class cities levying 80 cents
TAXATION:	tax for municipal purposes and 20
PARKS:	cents for park purposes may vote
RECREATION:	tax levy for recreational purposes.
ELECTIONS:	Combined levy for park and recre-
	ation not to exceed 20 cents.

June 29, 1962

OPINION NO. 102

Honorable Chester W. Hughes
Representative, Johnson County
208 Broad Street
Warrensburg, Missouri



Dear Mr. Hughes:

We are in receipt of your request for an opinion of this office which reads as follows:

"The City of Warrensburg, Johnson County, is a city of the third class, and a number of years ago, acted under Section 90.500, 1959 R.S. Mo., and adopted a two mill tax for free public parks.

The City Council has adopted a tax levy ordinance setting the levy for general municipal services at .80 cents per \$100.00 assessed valuation and at .20 cents per \$100.00 assessed valuation for park purposes.

The 71st General Assembly adopted Senate Bill no. 17 which purports to authorize the submission to the voters of a special tax election to authorize a tax of not more than two mills to be used for recreational purposes.

The following questions are propounded to your office for opinion:

(1) Can the City of Warrensburg, if approved by the voters, levy and collect an additional two mill tax to be used for recreational purposes in view of their present levy for park purposes?

Honorable Chester W. Hughes

(2) If the levy is voted, would it be in lieu of the existing park levy?

(3) Does any levy voted under Senate Bill No. 17 have to be included within the constitutional limitation for taxing?

(4) What is the form of the ballot to be used?"

Senate Bill 17 of the 71st General Assembly referred to in your letter now appears as Sections 64.750 to 64.780, RSMo Cum. Supp. 1961.

Section 64.755, RSMo Cum. Supp. 1961 provides as follows:

"1. The governing body or any political subdivision may provide, establish, equip, develop, operate, maintain and conduct a system of public recreation, including parks and other recreational grounds, playgrounds, recreational centers, swimming pools, and any and all other recreational areas, facilities and activities, and may do so by purchase, gift, lease, condemnation, exchange or otherwise, and may employ necessary personnel. Funds to be spent for such purposes may be set up in their respective budgets by any governing body.

2. If sufficient funds cannot be made available from ordinary levies, additional funds may be raised by a special tax levy, but no special tax shall be levied by any political subdivision unless the rate and

Honorable Chester W. Hughes

purpose of the tax is submitted to a vote and a two-thirds majority of the qualified voters voting thereon vote therefor. The rate of such special tax levied by a political subdivision or by cooperating political subdivisions shall not total in the aggregate more than two mills on each one dollar assessed valuation of all real and tangible personal property subject to its or their taxing powers. No two political subdivisions shall levy this special tax on the same property, and in the event that any political subdivision is now authorized by statute to levy a tax for this purpose, the combined levies authorized by such statute and by sections 64.750 to 64.780 shall not exceed the larger levy authorized."

Such section is applicable to the City of Warrensburg by virtue of the provisions of Section 64.750, which provides that the term "political subdivision" includes cities.

You state that Warrensburg now levies a tax of two mills on the dollar for public park purposes under the provisions of Section 90.500, RSMo. Such section which was re-enacted in 1949 in House Bill 2038 of the 65th General Assembly authorizes cities and towns of the second and third class and those with a population of under 30,000 to levy a tax not in excess of two mills on the dollar for free public parks, after being authorized to do so at an election called upon the petition of 100 tax paying voters of the city or town. Such section provides in part as follows:

"* * * Such taxes shall be within the constitutional limitation upon the power of any such city to levy taxes and shall cease in case the legal voters of such incorporated city or town shall so determine, by a majority vote at any annual election held therein."

Honorable Chester W. Hughes

Section 94.070, RSMo 1959, which was re-enacted in 1945 (Laws of 1945, page 1,282), provides in part as follows:

"In addition to the levy aforesaid for general municipal purposes, all cities of the third class are hereby authorized to levy annually not to exceed the following rates of taxation on all property subject to its taxing power for the following special purposes:

* * * * *

(3) For recreational grounds in the manner and at the rate authorized under the provisions of sections 90.500 to 90.570, RSMo."

The reference to "levy aforesaid for general municipal purposes" in Section 94.070 is to Section 94.060, RSMo 1959, which provides for a levy of not to exceed one dollar per one hundred dollar valuation which levy is made by the municipal legislative body. Such limit of one dollar per one hundred dollar valuation levy for municipal purposes is also found in Section 11(b) of Article X of the Constitution of Missouri.

It is clear that parks are included in the term "recreational grounds" found in Section 94.070.

The provisions of Section 94.070 authorizing a levy for recreational grounds at the rate provided in Sections 90.500 to 90.570, which rate is two mills per one dollar valuation, and which levy is in addition to the one dollar tax levy authorized by Section 94.060, and which is in addition to the one dollar maximum tax levy specifically authorized for cities in Section 11 (b) of Article X of the Constitution, are in conflict with the provisions of Section 90.500 authorizing the voting of a two mill levy for public parks in cities of the third class which section provides that such taxes must be within the constitutional limit, at least insofar as parks are concerned.

Honorable Chester W. Hughes

The rule of statutory construction applicable here is that where two statutes are in direct conflict with each other, the latter enactment prevails over the former. The Supreme Court stated this rule in the case of State ex rel. City of Republic v. Smith, 345 Mo. 1158, 139 SW2d 929, where the Court said, l.c. 934:

"* * * Moreover, where there are two acts on one subject, the rule is to give effect to both if possible, but if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as to repeal the first. * * *"

The fact that the later enactment, Section 90.500, was made by a revision bill does not affect the application of this rule of statutory construction. In the case of Montague v. Whitney, 298 SW2d 461, the St. Louis Court of Appeals enunciated such principle and said, l.c. 465:

"* * * By the enactment of H.B. No. 2049, the 65th General Assembly specifically repealed Section 11629 and enacted a new and different statute, Section 111.010 RSMo 1949, providing specifically that the provisions of 'this chapter' shall not apply to fourth-class cities. The section dealing with partially fraudulent ballots was a part of such chapter, and it was thereby made inapplicable to fourth-class cities."

Therefore, the levy voted by the voters of Warrensburg under Section 90.500 is a levy within the constitutional limits of one dollar per one hundred dollars valuation set forth in Section 11 (b) of Article X of the Constitution.

Since the total tax levy for Warrensburg is 80 cents per one hundred dollars for general municipal purposes and 20 cents per one hundred dollars for park purposes under Section 90.500, the total levy in such city is one dollar per one hundred dollars valuation. It follows that if any levy is made under the provisions of Senate

Honorable Chester W. Hughes

Bill 17, such levy must be authorized by a vote under the provisions of subsection 2 of Section 64.755, since the funds for a recreation system cannot be made available from ordinary levies which are the levies within the one dollar per one hundred dollar valuation constitutional limit.

The last sentence in Section 64.755 provides that if any political subdivision is now authorized by statute to levy a tax for "this purpose", the combined levies authorized by the statute levying a tax for "this purpose" and Senate Bill 17 shall not exceed the larger levy authorized.

We believe that the meaning of the last sentence in Section 64.755 is that any statute providing for a system of public recreation or for parks, for recreational grounds, for playgrounds, for recreational centers, for swimming pools or for recreational facilities and activities is a statute providing a levy for the purpose of the levy authorized by Senate Bill 17. Therefore, a levy for public parks authorized by Section 90.500 is for the purpose referred to in Section 64.755 and the provision of the last sentence of such section is applicable when a levy is authorized under Senate Bill 17. The first sentence of Section 64.755 relating to a "system of public recreation" specifically lists parks as one of the components of a system of public recreation. Further the second sentence of Section 64.755 refers to "such purposes" which means that there are several purposes or components of a system of public recreation that may be established by a political subdivision. However, when in the last sentence of such section reference is made to "this purpose" in the singular, we believe that it means any purpose found in Section 64.755, which is authorized by another statute and that therefore the authorization for a levy for public parks under the provisions of Section 90.500 is a levy for the purpose of the levy authorized by Senate Bill 17.

It follows, therefore, that since the purpose of the park levy which is a purpose authorized by Senate Bill 17 is now authorized by statute, that the total levy that can be made under both Senate Bill 17 and Section 90.500 be not in excess of the larger levy. Since Senate Bill 17 and Section 90.500 each authorize a maximum levy of two mills on the dollar, the combined

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levy cannot exceed two mills per one hundred dollar valuation.

If a levy is authorized by a vote under provisions of Senate Bill 17, the city council will exercise its discretion as to what levy will be made under authorization of Section 90.500 and what levy will be made under Senate Bill 17, but the combined levy cannot exceed two mills per one hundred dollars valuation.

Section 90.510, RSMo, makes clear the fact that the actual levy under Section 90.500 is at the discretion of the city council.

Section 64.780, Cum. Supp. 1961, provides as follows:

"The provisions of sections 64.750 to 64.780 shall not in any way repeal, affect or limit the powers heretofore or hereafter granted to any county, city, township, village or school district, under the provisions of any charter or by law, to establish, maintain and conduct parks and other recreational grounds and public recreation."

Such section makes clear the legislative intent that Senate Bill 17 should not repeal any statutes providing a tax levy for parks. Therefore, it is clear that the actual determination of the precise levies to be made under Section 90.500 and Senate Bill 17, if the voters authorize a levy under Senate Bill 17 has been left by the legislature to the discretion of the city council so long as the combined levies do not exceed two mills on the dollar.

The ballot in an election under Senate Bill 17 must state the purpose for which authorization is being voted and the maximum rate of levy authorized at such election.

CONCLUSION

It is the opinion of this office that since the City of Warrensburg is now levying 80 cents per one hundred dollars valuation for general municipal purposes and 20 cents per one hundred dollars valuation for park purposes authorized by a vote under Section 90.500, RSMo, such

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city can vote a levy of not to exceed two mills per one dollar valuation under the provisions of Senate Bill 17 of the 71st General Assembly, but that the city council must exercise its discretion to determine the actual levies to be made under the provisions of Section 90.500, RSMo and Senate Bill 17 of the 71st General Assembly, the combined levies not to exceed two mills per one dollar valuation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CBB:jh

JUNIOR COLLEGE DISTRICTS:
SCHOOLS:
SCHOOL DISTRICTS:
STATE AID:

1. School districts operating junior colleges do not have to meet organizational standards but must meet all other standards before being eligible to receive state junior college aid under Sec. 165.830, RSMo Cum. Supp. 1961.
2. Such school districts are entitled to state junior college aid for the school year from July 1, 1961 to June 30, 1962, with the amount of such aid to be computed on the basis of the number of semester hours completed by all students in such junior college during the preceding year from July 1, 1960 to June 30, 1961.

Opin. No. 103 ('62)

April 23, 1962

Hon. Hubert Wheeler
Commissioner
State Department of Education
Division of Public Schools
Jefferson Building
Jefferson City, Missouri

103

Dear Mr. Wheeler:

This is in reply to your letter of January 29, 1962, in which you requested an opinion from this office in answer to the following questions:

- "1. Would the seven public school districts offering two-year college courses under Section 165.123, on the effective date of this act be eligible to receive state junior college aid under Section 165.830, subsection 1, provided all scholastic standards for accreditation as established under the new junior college act are met, rather than meeting both the organization standards required for new junior college districts and the scholastic standards for accreditation?
- "2. Would school districts offering approved two-year junior college courses on the effective date of this act be eligible for state junior college aid this year, 1961-62, based on the semester hours of college credit completed by students in the junior college during the preceding year, and before the junior college act

took effect and before the accreditation standards were established; or whether such districts offering two-year college courses would be required to operate a year after the taking effect of the law and on the basis of the scholastic standards established under the new law in order to determine the semester hours of college credit completed the preceding year?"

We will answer these questions in the order they were presented.

The questions deal with state aid for junior colleges under Section 165.830, Cum. Supp. 1961, which reads as follows:

"State aid to junior colleges -- apportionment. -- 1. All students, resident in the State of Missouri, attending schools or classes of the junior college district shall be included in the attendance records of the junior college district for the apportionment of school funds. The junior college district shall be entitled to receive from state funds appropriated for junior college purposes the sum of two hundred dollars for each thirty semester hours of college credit completed by all students in the junior college during the preceding year; provided, however, that any junior college district organized under the provisions of sections 165.790 to 165.840 shall be entitled to state aid as provided in this section during the first year of its organization on an estimated number of semester hours of college credit completed by all students, this estimate to be adjusted on an actual number of college hours completed at the end of the year as defined in sections 165.790 to 165.840. A year is defined as from July first to June thirtieth of the following year. The term semester hour completed means for the

purpose of such claims actual participation during half or more of the session such course is offered. In the case of semester hours completed in a summer school session, the claim for such reimbursement shall be presented in the claim covering that particular school year in which such summer session ends. The actual number of pupils in attendance shall be computed by taking the total number of semester hours of work in which all junior college students are registered as of November first and March first in any school year and dividing by thirty.

"2. School districts offering two-year college courses under section 165.123, on the effective date of sections 165.790 to 165.840 shall receive state aid under subsection 1 provided all standards established under and pursuant to sections 165.790 to 165.840 are met."

The first paragraph of this section provides a formula for determining the amount of state aid to junior college districts, but it does not make any requirement for meeting scholastic or organizational standards before being eligible to receive the state aid. The second paragraph of this section provides that school districts offering two-year college courses on the effective date of the act (October 13, 1961) shall receive state aid the same as regularly established junior college districts, provided the school districts offering two-year college courses meet all standards established under the Junior College District Act. In answering your first question we must then determine what is meant by "all standards" in Paragraph 2 of Section 165.830.

Section 165.790 requires the State Board of Education to establish standards for the organization of junior college districts. However, this section does not refer in any way to the existing junior colleges which are operated by school districts, and the standards for organization are therefore not applicable to the existing junior colleges.

Section 165.793 requires the State Board of Education to supervise both the junior college districts formed under the

act and the junior colleges formed or in existence prior to the effective date of the act. In subparagraph (7) of paragraph 2 of that section, the State Board of Education is required to establish uniform minimum entrance requirements and uniform curricular offerings for all junior colleges, and in subparagraph (9) thereof the State Board of Education is made responsible for the accreditation of each junior college under its supervision. This section deals with all junior colleges and provides for standards of entrance requirements, curriculum and accreditation, but any standards for organization are noticeably absent from this section.

Section 165.840 places all junior colleges established prior to the effective date of the act under the supervision of the State Board of Education and requires such junior colleges to conform to the scholastic standards established by the State Board of Education. It specifically provides that a school district which now operates a junior college may not be dissolved because it does not meet the standards for organization. This section draws a clear distinction between the scholastic standards and the standards for organization. The scholastic standards are applicable to the junior colleges established prior to the effective date of the act, but the standards for organization do not apply to such school districts. "The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically,' is properly given consideration."--A. P. Green Fire Brick Co. v. Missouri State Tax Commission, 277 SW 2d 544, 545. When we consider all of the sections of the Junior College District Act, we must conclude that when the Legislature required school districts offering two-year college courses to meet "all standards" in order to be eligible to receive state aid, the Legislature meant all standards which were applicable to such school districts. The standards concerning entrance requirement, accreditation and scholastic standards are applicable to the school districts offering two-year college courses. Such standards must be met before the school district is entitled to receive state aid. The standards for organization are not applicable to school districts offering two-year college courses on the effective

date of the act, and therefore such school districts do not need to meet these standards for organization in order to be eligible to receive state aid under Section 165.830.

This conclusion is supported by a reasonable interpretation of the language contained in Section 165.837. In this section it is provided that, "...whenever the area of an entire school district which adjoins a district offering a two-year college course under Section 165.123, RSMo, on the effective date of this act and receiving aid under subsections 1 and 2 of Section 165.830, desires to be attached thereto for junior college purposes only ...", such annexation is completed under Section 165.300 and a special junior college district is established. This section further provides that, "...If the state board of education finds that refusal to honor the petition for annexation has been made without good cause, the state board in its discretion may withhold a portion or all of the state aid from said district which is payable under the provisions of sections 165.790 to 165.840." From the quoted portions of this section, it is clear that the Legislature intended that school districts operating junior colleges on the effective date of this act were to receive state aid under Section 165.830. It is also clear it was intended that such school district does not have to comply with any standards for organization in order to receive this state aid, and the last sentence of Section 165.837, supra, provides one express situation in which the state aid may be withheld from both a regularly established junior college district and a school district offering a two-year college course under Section 165.123, RSMo. That express situation permitting the withholding of state aid from such a school district deals with a problem in the annexation of land to junior college districts.

That peculiar situation involving an annexation problem authorizes the withholding of state aid. In order to withhold the aid it must have been forthcoming in the first instance. There is no requirement that the seven school districts now operating junior colleges must meet the standards for organization in order to continue operation. Rather, Section 165.840 states that such a district shall not be dissolved because it does not meet the standards for organization. In our opinion to you of November 9, 1961, we held that a junior college district organized under the provisions of the Junior College District Act cannot force a discontinuance

or dissolution of a junior college operated by a public school district so long as such junior college conforms to the scholastic standards established by the State Board of Education. In other words, a public school district operating a junior college does not have to meet the standards for organization of a junior college district. It necessarily follows that they are entitled to state aid without meeting the standards for organization.

It therefore appears, from a consideration of all of the sections of the Junior College District Act, that school districts offering two-year college courses do not have to meet the standards for organization of junior college districts in order to be eligible to receive state aid under the provisions of Section 165.830, and we so rule in answer to your first question.

Your second question deals with the effective date of eligibility to receive state aid and the basis or formula for determining the amount of state aid to be received by the district. In answer to your first question, we determined that it was not necessary for a school district offering a two-year college course on the effective date of the Junior College District Act to meet the standards for organization of junior college districts in order to be eligible for state aid. There were seven public school districts offering two-year college courses under Section 165.123, RSMo, on the effective date of the new Junior College District Act, and these seven public school districts are Flat River, Joplin, Kansas City, Noberly, St. Joseph, St. Louis City, and Trenton. In your opinion request you assumed that the established accreditation and scholastic standards would doubtlessly be met by these existing seven junior colleges. In answering your second question, we also assume that these seven junior colleges will meet all standards, except the standards for organization.

We note that scholastic standards have been established by the State Board of Education, and these standards have been promulgated in a publication entitled "Principles, Regulations and Standards for the Organization and Accreditation of Public Junior Colleges in Missouri", published by the State Department of Education in January of 1962. We reiterate that for the purposes of this opinion it is assumed that the seven existing public junior colleges in

Missouri meet these scholastic standards.

Under paragraph 2 of Section 165.830, these seven school districts operating junior colleges are to receive state aid the same as regularly established junior college districts. Therefore, for this purpose, we should treat the words "junior college district" as used in paragraph 1 of Section 165.830 as including the seven existing public junior colleges. The "...junior college district shall be entitled to receive from state funds appropriated for junior college purposes the sum of two hundred dollars for each thirty semester hours of college credit completed by all students in the junior college during the preceding year;" A year is defined as from July 1 to June 30 of the following year. Since the Junior College District Act became effective on October 13, 1961, the first year during which any junior college district could be eligible for state aid would be during the year from July 1, 1961 to June 30, 1962. The preceding year would have been from July 1, 1960 to June 30, 1961. All of the seven pre-existing junior colleges were in operation during the year from July 1, 1960 to June 30, 1961. They therefore have a preceding year on which to compute the amount of state aid to which they are entitled. Under the plain wording of this statute, both the junior college district and the seven existing junior colleges are entitled to state aid. We believe the Legislature intended that they should receive the state aid for the first school year after the effective date of the Junior College District Act. It is this act, itself, which establishes or creates the state aid and there is nothing wrong with the requirement in the law that the amount of the state aid to be received in the first year is to be determined by the number of semester hours completed during the school year prior to the effective date of the act. The intention of the Legislature that the state aid should be given at the earliest possible time is demonstrated by the terms of Section 165.830 which provide that a junior college district organized under the act is entitled to state aid during the first year of its organization on an estimated number of semester hours. Without this provision a newly organized junior college district would not be entitled to any state aid during its first year, because it would have no preceding year in which semester hours were completed to use as a basis for determining the amount of state aid to which it would be

entitled. But the Legislature, in its wisdom and in furtherance of its intention that all junior colleges should receive the state aid as soon as possible, made specific provisions for this condition. The Legislature could also have made specific provisions governing the receiving of state aid by the seven existing junior colleges for the first year in which the act became effective, but it did not do so, thereby fortifying the plain meaning which we attribute to and strengthening the interpretation which we have placed on the general provisions of Section 165.830 -- that the seven school districts offering two-year college courses under Section 165.123, RSMo, on October 13, 1961, are to receive state aid for the year from July 1, 1961 to June 30, 1962 on the basis of the number of semester hours completed by all students in such junior college during the preceding year from July 1, 1960 to June 30, 1961.

The express wording of Section 165.837, supra, concerning the withholding of state aid in a peculiar situation involving an annexation problem which we discussed previously in answer to your first question also supports the conclusion we have reached in answer to your second question.

From this interpretation of these sections, in answer to your second question, we are of the opinion that school districts offering two-year college courses under Section 165.123, RSMo, on October 13, 1961, are not required to operate a year after the effective date of the Junior College District Act on the basis of the scholastic standards established under the Junior College District Act in order to determine the semester hours of college credit completed during the preceding year. Rather, they are entitled to receive state junior college aid for the school year from July 1, 1961 to June 30, 1962 on the basis of the number of semester hours completed by all students in such junior college during the preceding year, from July 1, 1960 to June 30, 1961.

CONCLUSION

It is therefore the opinion of this office, as follows:

1. Public school districts operating junior colleges in Missouri on the effective date of the Junior College District Act do not have to meet the standards for organization

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of junior college districts in order to receive state aid to junior colleges under Section 165.830, RSMo Cum. Supp. 1961.

2. Assuming that they meet all standards except standards for organization under the Junior College District Act, public school districts offering two-year college courses under Section 165.123, RSMo, on October 13, 1961, are entitled to receive state junior college district aid under Section 165.830, RSMo Cum. Supp. 1961, for the school year from July 1, 1961 to June 30, 1962 on the basis of the number of semester hours completed by all students in such junior college during the preceding year from July 1, 1960 to June 30, 1961.

This opinion, which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WW:mc

WILLS:
PROBATE COURT:

The Probate Court must keep the original will permanently in its files.

OPINION No. 105.

July 10, 1962



Honorable T. E. Lauer
Prosecuting Attorney
County of Callaway
Fulton, Missouri

Dear Mr. Lauer:

This is in reply to your opinion request of January 29, 1962, wherein you ask:

"Probate Judge John Yates of Callaway County has requested that I obtain from your office an opinion as to the power of the Probate Judge to replace original copies of probate instruments in the court files with photographic copies thereof. The files of the Probate Court here contain many very old wills and other documents, some going back into the 1830s. Many of these wills and other documents are in very poor shape, and are rapidly falling to pieces. The court records themselves are, of course, in a number of bound books and are in reasonably good shape; the question here involves the original instruments and documents themselves, which are now contained in numerous old probate files and wrappers.

"A further question arises, if the original wills and other documents can be replaced, as to what disposition should be made of the originals. In Callaway County, there are a number

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of living descendants of the long-deceased testators who would like to obtain the old wills in order to preserve them. Would it be within the power of the Probate Judge, after replacing the original will or other document with a photograph, to turn over the original document to either the descendants of the decedents involved, or to an educational institution, public library, or historical society?"

Section 468.550, RSMo 1949, specifically provided for the retention by the clerk of the probate court of the original will filed for probate. Said section stated:

"All wills shall be recorded by the clerk of the probate court, in a book kept for that purpose, within thirty days after probate, and the originals shall be carefully filed in his office."

This section, however, was repealed by the Laws of 1955, and replaced by Section 472.280, RSMo 1959, which specifies the records that must be maintained by the probate court. Said section states, in part, as follows:

"1. The court shall keep the following:

(4) A record of wills exhibited to be proven properly indexed, in which shall be recorded such wills.
- - -"

It is noted that this section of the statute does not contain any language requiring the clerk of the probate court to retain the original wills. Said section merely requires that the will be "recorded."

However, a review of our statutes as a whole indicates a clear intent that the will be presented to the Probate

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Court and retained in the permanent files of said Court.

Section 473.043, RSMo 1959, provides that upon the death of the testator, the person having custody of the will "shall deliver it to the probate court," and if he so refuses, the court may, by legal powers, compel him to produce the will.

Section 473.047, RSMo 1959, holds that when any will is "exhibited to be proven" proof may be taken and a certificate of probate or rejection be granted.

Section 473.050, RSMo 1959, provides that no proof of any will shall be taken nor any certificate of probate issued unless the will "has been presented" to the probate judge or clerk within nine months of the date of notice of letters.

In *Keys v. Keys' Estate*, 217 Mo. 48, 116 S. W. 537, 541, the Court held that a claim was "exhibited and presented" to the Probate Court for allowance when it was deposited in court and filed by the clerk.

Furthermore, Section 473.073, RSMo 1959, provides that "the will shall be admitted to probate," if certain findings are made by the Court (underlining supplied).

Section 473.080, RSMo 1959, provides that the certificate of probate or rejection "shall be attached to each written will which is in the custody of the Court" (underlining supplied).

Section 473.087, RSMo 1959, provides that no will is effectual for the purpose of proving title to, or the right to the possession of, any real or personal property, disposed of by the will, "until it has been admitted to probate" (underlining supplied).

In *Missouri Practice*, Vol. 3 (Probate Law and Practice) Section 498, Records of the Probate Court, it is stated at page 451:

"The clerk must maintain a separate

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roll or file of the original papers and documents filed in each estate . . . In addition to the record maintained by keeping the original documents, it is required that several of the more important documents be recorded at length in records maintained for each of the types of the documents to be recorded." (Underlining supplied)

In *Vorhees v. Denny*, 372 Ill. 78, 22 N. E. 2d 677, the court interpreted the word "probate" when used as a noun. In doing so, the court quoted from 2 Blackstone's Commentaries, wherein it was stated that when a will is proved "the original must be deposited in the registry of the ordinary and a copy thereof in parchment is made out under the seal of the ordinary and delivered to the executor or administrator, together with a certificate of its having been proved before him, all of which together is usually styled the probate." The Court further stated at pages 678-679:

"This definition indicates that the term 'probate' when used as a noun, as distinguished from various portions of the procedure wherein the word is occasionally used as a verb, broadly contemplates the combined result of all the procedural acts necessary to the establishment of the will as a title instrument. The probate is not complete when the will is filed nor when the petition to admit it to probate is deposited with the clerk. Neither is it complete when the testimony of the subscribing witnesses has been taken and reduced to writing, nor even when the court has ordered that it be admitted to probate. . It is only when all of these things combined have been done, and the will with its proofs and the order admitting it to probate have all actually become a part of the records of the county

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court, that it can be said the will
has actually been 'admitted to pro-
bate'." (Underlining supplied)

In view of the foregoing, it is concluded that the requirement of Section 472.280(4) is not to be deemed as authority for removing the original will from the court file, but rather is a requirement that a recorded copy of such original will be maintained in the court file in addition to and not in substitution for said original will.

CONCLUSION

It is the opinion of this office that the Probate Court must keep the original will permanently in its files.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

March 19, 1962



Honorable W. D. Hibler, Jr.,
Member, Missouri House of
Representatives,
Brunswick, Missouri

Dear Mr. Hibler:

This letter of advice is issued in lieu of a formal opinion in answer to your inquiry of February 3, 1962 in relation to the legal sufficiency of the published financial statement of the City of Salisbury, Missouri covering the period from July 1, 1961 to January 1, 1962.

From time to time, the Attorney General's office has been asked to consider financial statements of fourth class cities under Section 79.160, RSMo 1959, with a view to determining whether such statements are sufficiently "full and detailed".

There are no appellate court decisions in Missouri construing the aforementioned statutes and the words "full and detailed". However, Circuit Judge Phil H. Cook of the Fifteenth Judicial Circuit of Missouri, did hear a case on the question and handed down a written decision on April 14, 1958.

I am enclosing (1) a copy of Judge Cook's decision, (2) a copy of the financial statement of the City of Hamilton, Missouri, giving rise to the litigation, as published in the Advocate-Hamiltonian under date of February 2, 1956, and (3) a copy of such City's financial statement published in the Advocate-Hamiltonian under date of January 18, 1962, such latter statement effecting compliance with Judge Cook's decision of April 14, 1958.

Until such time as either the Legislature or our appellate courts spell out what is meant by "full and detailed" we would suggest that Judge Cook's opinion be considered as a guide for the preparation of future financial statements.

Yours very truly,

JLO'M/MW
Encs

THOMAS F. EAGLETON
Attorney General

March 1, 1962



Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County Courthouse
Clayton, Missouri

Dear Mr. Anderson:

We are in receipt of your letter of February 9, 1962, in which you ask our opinion concerning H.B. 542, 71st General Assembly (now Section 79.050 RSMo Cum. Supp. 1961), which reads as follows:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor and board of aldermen. The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an election at which the issue is submitted, for the appointment of a collector and for the appointment of a chief of police, who shall perform all duties required of the marshal by law, and any other police officers found by the board of aldermen to be necessary for the good government of the city. If the board of aldermen does not provide for the appointment of a chief of police and collector as provided by this section, a city marshal and collector shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successors shall be elected or appointed and qualified."

You have asked whether the provisions of this section entitle fourth class cities to provide for the appointment of either a chief of police or collector or whether it requires that both offices be either elective or appointive.

It is our opinion that the word "and" as underlined above, must be construed as "or" in order to give effect to the intention of the legislature in passing this section. There being no connection between the duties and functions of the two offices there exists no logical reason why those who hold them should be selected in the same manner.

Your attention is directed to the last part of the section which authorizes the Board of Aldermen to "provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner . . . ". The word "and" is used here obviously in the disjunctive; we believe that this use is analogous to the use in connection with the provisions concerning the chief of police and collector.

We are therefore of the opinion that the provisions of Section 79.050, RSMo Cum. Supp. 1961, regarding the appointment or election of chiefs of police and collectors in cities of the fourth class, must be construed in the disjunctive. The Board of Aldermen of such city may provide that one of these offices be filled by appointment without having to provide that the other be filled in the same manner.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

BE:ms

OPINION REQUEST NO. 119
answered by letter.

March 15, 1962

Honorable Charles A. Weber
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri

119

Dear Mr. Weber:

This is in reply to your opinion request of February 14, 1962, in which you state:

"I would like an opinion on the following circumstances:

"In october of 1961 a defendant was convicted of a misdemeanor in the Magistrate Court of Ste. Genevieve County, Missouri. Within the allotted time the defendant appealed this conviction to the Circuit Court and the case was set down for trial in November of 1961. On the day set for trial the defendant did not appear and his appeal was dismissed by the Circuit Court. The defendant did not perfect an appeal to a higher court.

"My question is this: Since the conviction in the Magistrate Court the defendant has not paid the fine and costs assessed by the magistrate, and since the appeal was dismissed by the Circuit Court, would a committment be issued from the Magistrate Court which had original jurisdiction, or should it be issued by the Circuit Court."

I have enclosed an opinion of this office, dated March 25, 1954, to Honorable Stephen Pratt, Prosecuting Attorney of Clay County, which holds that when a magistrate court's conviction is dismissed on appeal by the Circuit Court, said judgment and conviction of the magistrate court is reinstated and becomes of full force and effect.

The following cases are also in support of this holding: Barns v. Holland, 3 Mo. 47; Runkle v. Hagan, 3 Mo. 234; Manion v. State, 11 Mo. 578.

On the basis of the enclosed opinion, the misdemeanor conviction in the Magistrate Court of Ste. Genevieve County would be reinstated and become of full force and effect as a result of the appeal dismissal by the circuit court.

Therefore, the commitment of this defendant would issue from the Magistrate Court of Ste. Genevieve County and not from the circuit court which dismissed defendant's appeal.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

1 enclosure

TEACHERS
CONFLICT OF INTEREST
AGAINST PUBLIC POLICY

Opinion No. 120 answered by letter.

July 5, 1962



Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri

Dear Mr. Anderson:

Reference is made to your request for an opinion of this office reading in part as follows:

"There has been evidence presented that in some instances various music instructors and directors employed by school districts are engaged in the practice of 'recommending' certain music retail outlets to their students for the purchase of musical instruments. Upon the sale of the musical instrument from these outlets, a commission is paid to the said musical director.

"Although these instruments are purchased by individuals and not by school districts, we are interested in ascertaining whether or not the arrangements described above would create any conflict and would also create any unjust influence and restriction on the individual purchasing the instruments.

"Your office is being contacted on this matter for an opinion because of the quasi-public position in which is found the music directors of the public schools in the county. A further reason it was brought to our attention is that a particular music retailer has inquired as to the legality of this matter before engaging in said practice."

Honorable Norman H. Anderson

Although the described practice of recommending for commission would appear to create a conflict of interest and create an unjust influence and restriction on the individual purchasing the instrument, particularly in view of the highly confidential relationship of a teacher and pupil, it is our view that the present criminal statutes of Missouri do not prohibit the practice in question.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PAS:ltt

Opinion 122, Answered by Letter
(Joseph Nessenfeld)

March 12, 1962

122

Mr. Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

This will reply to your recent letter requesting
our informal opinion as follows:

"I respectfully request an informal
opinion regarding the State's obligation for the payment of gross earnings
tax on utility bills. Is the State
exempt from such tax or liable for
payment of the tax?"

As we understand your question, the tax is a license tax
imposed upon the utility based upon the gross receipts. It
is not imposed upon the consumer. There is no question concerning the right of the municipality to impose such a
license tax. See *Union Electric Co. v. City of St. Charles*,
Mo. Sup., 181 S.W. 2d 526. In that case, it was held that a
license tax measured by gross receipts does not constitute,
directly or indirectly, a sales tax.

The mere fact the utility presently lists the tax
separately from the other portion of the charge for its
services does not have the effect of making the tax one
imposed upon the consumer. The charge for the services
rendered is the aggregate amount shown on the bill including
that portion of the charge represented by the "tax". "The
utility remains the party taxed, and the utility still pays
the tax." See *State ex rel City of West Plains v. Public*

Service Commission, Mo. Sup., 310 S.W. 2d 925, 934; and State ex rel Hotel Continental v. Burton, Mo. Sup., 334 S.W. 2d 75,82. The tax is but one expense of operation. The last two cited cases hold that the Public Service Commission may authorize a utility to state the amount of the tax separately from the balance of the customers' charges, and thereby "partially itemize" the bills. However, irrespective of the method of billing, the money with which the utility pays the tax is necessarily obtained in every instance from the customers. The incidence of the gross receipts tax is not changed by the fact that charges are itemized. It may be added that there is no constitutional prohibition against the assessment of an excise tax upon the State of Missouri. See State ex rel Missouri Portland Cement Co. v. Smith, 90 S.W. 2d 405 (which involved the 1875 Constitution). Section 6 Article X of the 1945 Constitution exempts only the real and personal property of the state from taxation. We are aware of no provision in the law which would exempt the State of Missouri from liability for that portion of the charge of the utility for service rendered which results from the levy of an excise tax such as the gross receipts license charges of various municipalities.

It is our opinion, therefore, that the State is liable for payment of the bills in the situation set forth in your letter.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

Opinion Request No. 123 answered by
letter by Howard L. McFadden.

February 28, 1962



Honorable Stephen E. Strom
Prosecuting Attorney
Cape Girardeau County
First Federal Savings Building
Cape Girardeau, Missouri

Dear Sir:

This is in response to your request of February 22, 1962 for an opinion stated by you as follows:

"Is the recorder's fee for making and preserving direct and inverted indexes to deed books limited to 20¢ for each instrument indexed, regardless of the number of parties to the instrument?"

"Does the statutory fee allowance of 50¢ 'for every certificate and seal' refer to the recording of such certificate and seal or to the providing by the recorder of his official certificate and seal? If the former, may the recorder charge for more than one such recording where recordation is accomplished by photographing the instrument?"

As indicated in your letter, there appears to be no case law interpretation of the manner in which the particular fees in question are to be applied.

As we read Section 59.310, RSMo 1959 it would appear to us that the answer to your first question is in the affirmative so that only a 20¢ charge per instrument may be made, regardless of the number of grantees and grantors whose names must be indexed or the number of books in which the entries must be made.

Hon. Stephen E. Strom - 2.

February 28, 1962

Likewise the 50¢ fee established for every certificate and seal applies not to the number of notarial acknowledgments present on each instrument but only to certificates and seals made by the recorder for such purposes as he is required to perform.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

Opinion Request No. 126
answered by letter.

August 14, 1962

Honorable Garner L. Moody
Prosecuting Attorney
Wright County
Mansfield, Missouri



Dear Mr. Moody:

This office is in receipt of your request for a legal opinion upon the inquiry presented in your letter and in a subsequent letter, dated May 22, 1962. The factual situation, as well as the question for which an opinion was requested is given in greater detail in your second letter.

Reference is made in both letters to Section 262.597, RSMo Cum. Supp. 1961. This section authorizes a county court to appropriate in Class 4 of the county budget a sum sufficient to take care of the county's part of the expense of county agricultural extension work. Under paragraph 4 of the section, in counties with an assessed valuation of more than \$10,000,000.00 and less than \$15,000,000.00, the county court shall appropriate the minimum sum of \$2,500.00 for this purpose.

You advise that Wright County is in the assessment bracket set out in Paragraph 4 of Section 262.597, but the county court of said county has appropriated only \$1,500.00 for county extension work. Since there are no funds available for payments not budgeted, you question whether or not the court must make an appropriation to extension service of more than \$1,500.00. We understand the question for an opinion to be:

"I would like to know if the Court must or may pay the additional \$1,000.00 and from what funds such sum could be paid since it was not budgeted."

August 14, 1962

This office rendered an opinion to Honorable Leo Mitchner, County Clerk of Ripley County, on April 23, 1948, in which the factual situation was similar to that involved in the present inquiry. From the factual situation of the former opinion it appears the Ripley County Court had appropriated \$1,500.00 in Class 2 of the 1948 budget for expense of holding circuit court, and nothing was appropriated in the budget for the Ripley County Farm Bureau.

As the result of a mandamus suit in Circuit Court, the County Court had been ordered to appropriate \$1,000.00 to the Farm Bureau, and by its order, the County Court transferred \$1,000.00 from Class 2 to Class 4, for the Ripley County Farm Bureau.

It was pointed out in said opinion, Section 10914, RSMo 1939, permitted the County Court to transfer surplus funds from Classes 1, 2, 3 and 4 to Class 5 for contingency and emergency expenses. This being the only provision for transferring Class 2 funds, it presupposed an actual surplus, and that (under the facts) funds could not be transferred from Class 2 to Class 4.

It was further pointed out in such opinion that funds in Class 5, the contingency and emergency fund, should not be paid until the entire amount budgeted in Class 4, including the \$1,000.00 County Farm Bureau expense had been paid, since the statutory expenditures in Class 4, have priority over discretionary expenditures in Class 5.

The case of Gill v. Buchanan County, 142 S.W.2d 665, holding the full pay of a county judge was by law made a part of the county budget whether or not the court had actually included it in the county budget, was cited as authority for stating the circuit court's order that the county court pay the Ripley County Farm Bureau \$1,000.00, was by force of law included as an expenditure in Class 4 of the budget.

The first conclusion reached was that the county court had no power to transfer funds from Class 2 to Class 4 of the budget to pay the county's share of the expense of the Farm Bureau, when payment had been ordered by the Circuit Court.

The second conclusion reached was that if there were insufficient funds in Class 4 of the county budget to pay all claims on that class, the County Court should apportion and appropriate to each office the available funds in Class 4, in the proportion the approved estimate of each office bears to the total approved estimate in Class 4.

August 14, 1962

Sections 10911, 10912, and 10914, RSMo 1939, referred to in the above-mentioned opinion, are now Sections 50.680, 50.690, and 50.710, RSMo 1959, respectively.

The Missouri Agricultural Extension Laws were enacted in 1955, and by them the county extension counsel became the successor of the Farm Bureau. For this reason it is believed such opinion is fully applicable to the present opinion request. That under principles declared in such opinion, the Wright County Court had the duty to appropriate in Class 4 of the county budget, the minimum sum of \$2,500.00 for county agricultural extension work, regardless of the fact there may not have been sufficient funds available to include this amount in Class 4.

In view of the fact said sum of \$2,500.00 for county agricultural extension service was a legitimate expenditure, it was included in Class 4 of the budget by operation of law, regardless of the fact the county court had not actually included it in Class 4.

After the County Court had included only \$1,500.00 for extension work in Class 4, and it appeared there would not be sufficient funds in that Class to pay all obligations in full on such Class 4, it then became the duty of the County Court to apportion and appropriate available funds in Class 4, to each office, as provided in the opinion mentioned above, and if there were still lacking funds sufficient in Class 4, to pay all obligations on that fund, including the \$2,500.00 for county extension work, the County Court might then transfer any surplus funds in Class 5 to Class 4 to meet the lack of funds sufficient to take care of all lawful obligations on Class 4.

It is believed the Mitchner opinion fully answers the present inquiry, and a copy of same is enclosed for your consideration.

The foregoing opinion which I hereby approve was prepared by my assistant, Paul N. Chitwood.

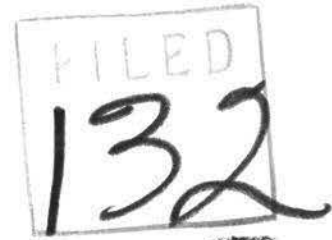
Very truly yours,

THOMAS F. EAGLETON
Attorney General

PNC:at
Enclosure

(Opinion Request No. 132 answered by this letter.)

March 20, 1962



Honorable William J. Esely
Prosecuting Attorney
Harrison County
Post Office Box 104
Bethany, Missouri

Dear Mr. Esely:

This is in answer to your letter dated February 28, 1962, in which you request an opinion of this office concerning motor vehicle registration and eligibility of county officials to hold elective offices at the city level.

The first portion of your opinion request can be briefly answered by the fact that the information presented to you by a member of the Highway Patrol is inaccurate. The position of the Department of Revenue is to issue a motor vehicle license plate for the month of January if the licensee applies for the plate during the first half of February. If application is made during the second half of the month, then a February license plate is issued. A member of my staff explained this procedure to you in a recent telephone conversation.

The second portion of your opinion request concerns itself with the doctrine of "incompatibility of public offices". This case law theory is discussed in two previously written opinions by this office; the first being written on March 2, 1961, and addressed to the Honorable A. J. Anderson, Prosecuting Attorney of Cass County; the second being written on March 12,

Hon. William J. Esely

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March 20, 1962

1954, and addressed to the Honorable Lane Harlan, Prosecuting Attorney of Cooper County. The theories contained in these previously written opinions and the conclusions reached therein should sufficiently answer your problems. I am enclosing these opinions for your information.

It is the understanding of this office that the information contained in this letter should sufficiently answer your opinion request.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enclosures

EGB:mc

INSURANCE: Articles of Incorporation of Continental Security
Life Insurance Company.

OPINION No. 133

March 12, 1962

FILED
133

Honorable Jack L. Clay
Superintendent, Division of
Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

Receipt is acknowledged of your letter of March 2, 1962, with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Continental Security Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also Forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'N:at

INSURANCE: Membership Certificate No. 7799 negotiated by Jimmy Osburn Burial Service Association of Pemiscot County, Missouri, evidences an insurance contract and persons negotiating such agreements without being duly licensed by the State Division of Insurance are amenable to penalties prescribed in Secs. 375.300 and 375.310, RSMo. 1959.

OPINION NO. 135

April 5, 1962



Honorable Jack L. Clay
Superintendent, Division of
Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

This opinion is in reply to your inquiry reading as follows:

"Attached hereto is a membership certificate and a receipt wherein I respectfully request an opinion from your office as to whether this constitutes an insurance contract and, if so, does it come under the jurisdiction of this office."

In order that no doubt will be entertained as to the complete provisions of Membership Certificate No. 7799 issued by Jimmy Osburn Burial Service Association we here set forth the full text of Membership Certificate No. 7799:

"Membership Certificate

WHEREAS, the person named herein has made application for membership in the undersigned Association, and has in all respects complied with the By-Laws and Constitution thereof, as expressed in its Articles of Association.

THEREFORE, it is hereby certified that the person named below is a member of said Association and is entitled to be furnished by said Association a

funeral in the amount stated herein, as follows:

<u>Name</u>	<u>Age</u>	<u>Amount of Funeral</u>	<u>Monthly Dues</u>	<u>Quarterly Dues</u>
Maggie Farris	78	\$100.00		\$2.00

Membership shall be suspended on non-payment of dues more than 15 days delinquent, but shall be deemed reinstated on payment of all delinquent dues, if paid by or for such member while in good health. And 80 percent of all dues paid by or for a member who is suspended at time of death shall be applied on a funeral of such suspended member when furnished by the Manager-Treasurer of said Association.

And when any member has paid dues aggregating the amount of the funeral stated in his or her Certificate, plus 20 percent, such member shall be henceforth relieved of further payment of dues.

The Manager-Treasurer shall furnish all graves, burial supplies and Funeral Services for deceased members, except graves and Funeral Services when the interment occurs more than fifty miles from Wardell, Missouri, and in such cases, only burial supplies will be furnished to the amount named in this Certificate, by the Manager-Treasurer.

IN WITNESS WHEREOF, the Jimmy Osburn Burial Service Association of Pemiscot County, Missouri, has caused this Certificate to be signed by its Manager-Treasurer and counter-signed by its Secretary, this the 13th day of December, 1955, at Wardell, Missouri.

ATTEST:

s/ Mrs. Jimmy Osburn
Secretary

s/Jimmy Osburn
Manager-Treasurer "

(Shown on reverse side of the above Membership Certificate is the following language:)

"Certificate No. 7799
JIMMY OSBURN
BURIAL SERVICE ASSOCIATION
of Pemiscot County, Missouri
WARDELL, MISSOURI

Issued to the Person or Persons
Named Herein

Next Quarterly or Monthly Dues of
\$2.00 is due on the 1st day of
April, 1956.

In Case of Death
IMMEDIATELY NOTIFY JIMMY OSBURN, Manager-Treasurer
Wardell, Missouri Phone 2471."

We review Membership Certificate No. 7799, quoted above, with a view to determining if the same, in point of law, constitutes the negotiation of an insurance contract in violation of Section 375.310, RSMo 1959, providing in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * * "

We further view Membership Certificate No. 7799 to determine if those who negotiate such a membership certificate as agents are in violation of Section 375.300 RSMo 1959, reading as follows:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance division of this state the certificate authorizing him to act as such agent or solicitor, as required by section 375.010, or who shall act as agent or solicitor for any individual, association of individuals or corporation engaged in insurance business, before such individual, association of individuals or corporation shall have been

duly authorized and licensed by the superintendent of the insurance division of this state to transact business in this state, or after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

Missouri statutes do not define the word "insurance". In *State ex rel. Inter-Insurance Auxiliary v. Revelle*, 165 S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

The insurance character of burial associations is attested by the following language found in Section 376.020, RSMo 1959, of Missouri's regular life insurance law:

" * * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri; all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named

by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be a life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Section 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

Of particular interest in connection with the contract here being considered we submit the following text from Couch on Insurance 2d, Sec. 1:63:

"A contract of industrial or burial insurance must be distinguished from a contract with an undertaker for the advance purchase, whether or not on an installment plan, or funeral services to be rendered the purchaser upon his death. Thus, a contract to furnish funeral services and burial clothing will not be held to constitute life insurance from the fact alone that the performance of the contract is contingent upon the death of the insured, in the absence of evidence to show that the amount payable by the purchaser is less than the value of the funeral or merchandise contracted for, or that there is any element of risk involved on the part of either the purchaser or the seller, at least where the contract does not purport upon its face to be one of life insurance. Except as such a contract may be specifically declared life insurance by statute, the issuance by the proprietor of a funeral home of contracts which, by their terms, entitle the holders and their families or dependents to complete funeral services at cost plus 10 per cent, but contain no provisions for periodical assessments or dues or for the forfeiture of payments, is merely a contract for the sale of goods and services rather than a contract of insurance and is therefore not subject to a statute regulating the business of insurance."
(Underscoring supplied.)

The underscored language in the preceding quotation from Couch on Insurance 2d, Sec. 1:63, reflects a rule by which Contract No. 1515, here being considered, will be judged.

Membership Certificate No. 7799, dated December 13, 1955, evidences an agreement whereby Jimmy Osburn Burial Service Association has agreed to furnish Maggie Farris a funeral valued at \$100.00. The monetary consideration moving to Jimmy Osburn Burial Service Association to support the contract is shown by the obligation placed upon Maggie Farris to pay quarterly dues of \$2.00. When Maggie Farris has paid dues totaling \$120.00 she is relieved of further payment of dues. Membership under Membership Certificate No. 7799 becomes suspended when payment of dues is delinquent more than fifteen days, but reinstatement is effected by payment of delinquent dues.

In searching for the "risk" element which is necessary to make Membership Certificate No. 7799 take on the character of an insurance contract we find such "risk" element by considering the entire language of the Certificate in the light of the accepted purpose of the agreement. The agreement is to furnish a funeral having a value of \$100.00 for a named person so long as that person is not delinquent in payment of dues under the agreement. Such agreement is not conditioned upon the holder of the Certificate having paid dues equal to \$120.00, for that condition relates only to a paid-up Certificate. In the absence of any provision in the Certificate stipulating that the member, or someone in his behalf, must furnish payment of dues equaling the stated amount of the funeral to be furnished, it must be reasonably concluded that should the holder of Membership Certificate No. 7799 die before payment of quarterly dues in an amount totaling \$100.00, the Jimmy Osburn Burial Service Association is obligated under the Certificate to furnish a funeral of a value of \$100.00, and in the light of such facts we discover the "risk" element in Membership Certificate No. 7799. In such an instance we find that Jimmy Osburn Burial Service Association has agreed to furnish a funeral in the stated amount of \$100.00 for a sum of dues payments which may or may not bear any true or correct relationship, in money value, to the agreed price of the funeral.

We go a step farther and demonstrate how, under Membership Certificate No. 7799, the "risk" element becomes even more evident. Under Membership Certificate No. 7799, the value of the funeral is set at \$100.00, with quarterly dues payable by Maggie Farris in the amount of \$2.00. With Maggie Farris' age

being seventy-eight years at the inception of her membership, the timely payment of quarterly dues will not allow such payments to total \$100.00 before expiration of at least twelve years, and the Maggie Farris would then have reached the age of ninety years.

We cannot conclude otherwise than that Membership Certificate No. 7799, described above, is an insurance contract.

Conclusion

It is the opinion of this office that Membership Certificate No. 7799, dated December 13, 1955, issued to Maggie Farris by Jimmy Osburn Burial Service Association of Pemiscot County, Missouri is a contract of insurance within the meaning of Section 375.310 RSMo 1959, and offering of the same to the public without meeting the requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons and corporations so offering such contracts to be subject to the penalties prescribed by Sections 375.300 and 375.310 RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'M:at

SCHOOLS:
SCHOOL DISTRICTS:
SCHOOL BOARDS:
CONTRACTS:
BIDS:
BIDDING ON CONTRACTS:
PUBLICATION:
ADVERTISING FOR BIDS:

Boards of education of school districts in the state of Missouri are not included within the meaning of the terms "officer or agency of this state" as that term is used in Section 8.250, RSMo 1959.

*N.B. §177.086, RSMo Supp 1965
requires bids on all construction
over \$2500.*

Opinion No. 139

August 20, 1962

Honorable Hubert Wheeler
Commissioner, State Department
of Education
Jefferson Building
Jefferson City, Missouri



Dear Mr. Wheeler:

This is in answer to your letter of March 12, 1962, in which you refer to Section 8.250, RSMo 1959, and ask for an official opinion of this office in answer to the following questions:

"Does the term 'officer or agency of this state' have reference only to the state of Missouri, its officers, agencies, boards and commissions?

"Or would boards of education of school districts be included in this act?"

Section 8.250, RSMo 1959, reads as follows:

"No officer or agency of this state of of any city containing five hundred thousand inhabitants or over shall make any contract for the expenditure of moneys appropriated by the state in whole or in part, or raised in whole or in part by taxation, for the erection or construction of any building, improvement, alteration or repair, if the total cost exceeds ten thousand dollars, until public bids therefor are requested and solicited by advertising for ten days in one newspaper in the county where the work is located; and if the cost of the work contemplated exceeds thirty-five thousand dollars, bids shall be solicited by advertisement for ten days in two daily newspapers in the state which

Honorable Hubert Wheeler

have not less than fifty thousand daily circulation in addition to the advertisement in the county where the work is located. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which the bids are requested or solicited. No contract shall be awarded when the amount appropriated for same is not sufficient to complete the work ready for service."

This law was first enacted in 1909 and is found at page 346 of the Session Laws of that year. As originally enacted and continued in effect until 1957, this law read as follows:

"No contract shall be made by an officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing five hundred thousand inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having

Honorable Hubert Wheeler

not less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

We are unable to find any case construing this law with respect to school districts or members of the school board. With respect to cities the St. Louis Court of Appeals in 1935 construed this section in the case of Dunham Construction Co. v. City of Webster Groves, 231 Mo. App. 1089, 84 SW2d 183. In that case the Court held that this law was not applicable to cities containing less than 500,000 population.

In the case of Missouri Public Service Corporation v. Fairbanks, Morse & Co. D.C., 19 F. Supp. 38, the Federal District Court refused to follow the Dunham Construction Co. case and held that this law was applicable to the City of Trenton, Missouri, which had less than 500,000 population.

When the law was changed in 1957, a revisor's note follows Section 8.250, on page 33 of the MRS Cum. Supp. for 1957 which reads:

"Revisor's note: The first sentence in this section was rewritten in 1957 to conform to the decision in Dunham Const. Co. V. City of Webster Groves, 231 Mo. A. 1089, 84 S.W.(2d) 183 (1935), and to make clear its meaning."

Apparently the revision of this section did not make its meaning clear enough because we are now called upon to construe the meaning of the words "officer or agency of this state", and to determine whether a school district and its board of education are included within their purview.

As indicated previously we are unable to find a Missouri case directly in point. From a reading of the available authorities in other jurisdictions, it appears that the decisions construing these and similar words rest on the application of the particular facts of each case to the exact language of the statute involved.

Honorable Hubert Wheeler

The case of *Muse v. Prescott School District* (Ark.) 349 SW2d 329, was a case involving the Workmen's compensation Act which referred to "... the State of Arkansas and its several agencies . . .", and the question of its coverage for teachers in the public schools. At page 330, the Court stated:

"[2] Does a public school teacher come within the purview of Act 462 of 1949?"
To state it differently, is a school district an agency of the State, and its employees consequently state employees? Here again, the answer to each question is 'no.'"

At page 331, the court stated:

"Appellant contends, that even though a school district is a governmental subdivision, it still has the status of a state agency, and public school teachers are afforded coverage by the act just quoted. Perhaps, giving the word a loose or general meaning, school districts might be termed state agencies, inasmuch as the Legislature designated to such districts the duty of educating the children of the state in elementary and secondary schools; however, we do not agree that this general term has any application, nor any pertinence, to the language of the statute under consideration."

The Court then concluded that a school district is not an agency of the state.

The case of *Board of Education of Cecil County, to Use of International Business Machines Corporation, v. Phillip Lange, et al.*, 182 Md. 132, 32 A. 2d 693, was a suit on a bond involving the question of whether the performance bond given in connection with the construction of a school building was given to the State of Maryland or any of its agencies. In that case the Court said at page 694:

"As we view this case, the main question for decision is whether the Board of Education of Cecil County, or any other county, in the construction of a school

Honorable Hubert Wheeler

building, is or is not an agency of the State, and this depends on the construction of section 45, Article 77, Code (1939), Act of 1916, ch. 506, sec. 250, * * *

At page 695 of that case the Court said:

"[3,4] In the recent case of Clauss v. Board of Education of Anne Arundel County, Md., 30 A. 2d 779, 782 decided after this case was heard below in an elaborate opinion by Judge Marbury we construed section 45, in the repair of a school building (which, of course, includes construction) by the Board of Education as not being done by it as an agency of the State. On the authority of that case, we hold that in the construction of the Cecilton School, it was not a State agency, and that, therefore, section 11 Article 90 of the Code, has no application, and the bond sued on here is not bound by its terms. * * *

These two cited cases are authority for concluding that school districts and boards of education are not within the purview of the term "officer or agency of this state" as that term is used in Section 8.250, RSMo 1959.

It is our opinion that the legislature did not intend to make Section 8.250, RSMo 1959, applicable to school districts generally and there are cogent reasons supporting this position.

We are not required to make a ruling on whether the school district and school board of St. Louis City are an officer or agency of the City of St. Louis, even though the City of St. Louis has over 500,000 inhabitants, since they are governed by Section 165.603, RSMo 1959, which is a special statute and will control them instead of the general statute under consideration here.

One convincing reason for our conclusion on school districts generally is the language of the statute itself. Section 8.250, RSMo 1959, is applicable only to any " * * * officer or agency of this state or of any city containing 500,000 inhabitants or over * * *." From the authorities previously cited in this opinion, we conclude that a school district is not an agency of the state and

Honorable Hubert Wheeler

a school board is not an officer of the state within the meaning of this section. In addition, the advertisement must be " * * * for ten days in one newspaper in the county where the work is located * * *." It is a matter of public knowledge that there are no daily newspapers published in many counties of Missouri. The requirement of advertising for ten days in one newspaper in such counties is difficult of application and this is an additional reason for concluding that school districts are not included within the meaning of Section 8.250, RSMo 1959.

Another reason which impels our conclusion concerning the legislative intent in this instance is the Revisor's Note appearing on page 33 of the MRS Cum. Supp. for 1957 which is quoted previously in this opinion.

The decision in the Dunham Construction case, supra, held that this section as it was previously worded was not applicable to cities containing less than 500,000 population. Although the decision in the Dunham Construction Company case did not deal with school districts, it is clear that if the reasoning of that opinion is applied to school districts, it must necessarily follow that Section 8.250, RSMo 1959, is not applicable to school districts in cities containing less than 500,000 population. The Revisor's Note accompanying the change in the law in 1957 obviously demonstrates that it was the intention of the legislature to follow the decision in the Dunham Construction case and to abrogate the decision in the case of Missouri Public Service Corporation v. Fairbanks, Morse & Co., supra. Following this reasoning the conclusion is inescapable that the legislature intended Section 8.250, RSMo 1959, to apply only to officers and agencies of the state and of cities of more than 500,000 inhabitants. Therefore, school boards and school districts were not intended to be included within the meaning of this section since they are not an officer or agency of this state as that term is used in Section 8.250, RSMo 1959, and since there are no school districts in cities of over 500,000 inhabitants (with the exception of St. Louis City, which is governed by a special statute).

CONCLUSION

It is therefore the opinion of this office that boards of education of school districts in the State of Missouri are

Honorable Hubert Wheeler

not included within the meaning of the terms "officer or agency of this state" as that term is used in Section 8.250, RSMo 1959.

The foregoing opinion which I hereby approve, was prepared by my assistant, Wayne W. Waldo.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

WWW:lt

July 10, 1962



Honorable Bill Davenport
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Mr. Davenport:

In response to your opinion request of March 12, 1962, concerning the county's obligation to pay for the recording of right-of-way deeds for public roads, and your further question about which fund the payment should be charged against, we are, hereby, answering.

As you pointed out in your letter of May 25, 1962, there is no specific authority directing the county to pay for the recording of right-of-way deeds, but there is general authority given to the county to establish a road at the county's expense in Section 228.050, RSMo 1959:

"2. . . . If the (county) court shall find that the facts do justify the establishing of such road, either at the expense of the county, or of the petitioners, or both, it shall make an order accordingly."

The recording of right-of-way deeds is a necessary expense in the establishing of roads as deeds affecting real estate are required to be recorded by Section 442.380, RSMo 1959. So if the county court then orders the county to bear the expense of establishing a road then it shall bear the cost of recording of right-of-way deeds.

Honorable Bill Davenport

Class four counties such as Christian County must classify their expenditures into six classes under Section 50.680, RSMo 1959, which provides in part:

"The court shall classify proposed expenditures in the following order:

* * * * *

Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district) . . .

Class 5. . . . a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes one, two, three, four to class five to be used as contingent and emergency expense. From this class the court may pay contingent and incidental expenses . . . not otherwise classified."

On its face it would look as though class 3, supra, would be controlling in this case as recording of right-of-way deeds can be included in the "amount required . . . for the . . . construction . . . of roads on other than state highways (and not in any special road district)". But the Supreme Court of Missouri held in *Everett v. County of Clinton*, 228 SW2d 30 (Mo. 1955) that when the county bought road graders, it was not necessary to use class 3 but class 5 could be used.

"The purchase price of road machinery was clearly not required to be budgeted under the head of proposed expenditures for repair, upkeep and construction of roads and bridges. The necessity for replacement of such road machinery was in the nature of 'current expenses of the county' and as such was payable out of general revenue as a class 5 expense, if so budgeted and provided for."

Substituting "recording of right-of-way deeds" for "road graders", the conclusion is reached that if the county so provides

Honorable Bill Davenport

in the budget, then either class 3 or class 5 may be used. Class 3 because recording of right-of-way deeds is a necessary incident in the establishment and construction of roads. Class 5 because it is a "contingent and incidental" expense not otherwise classified.

It is also possible, if the requirement is met of having actual cash on hand sufficient to pay all claims against the prior five classes, to pay this out of class 6 of Section 50.680, supra, which provides:

"Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose, provided however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six; provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class six."

Therefore, it is my belief that the county may pay for the recording of right-of-way deeds out of either class 3 and class 5 funds if so provided or from class 6 funds if the requirement is met.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JF:ms

RECORDER OF DEEDS:
FEES AND SALARIES:
COMPENSATION:
VETERAN'S DISCHARGES:

The recorder in third class counties is required and permitted to furnish only one free copy of a veteran's discharge on his request to be paid for by the County Court, if such discharge has been recorded, and the recorder is permitted to retain the one 50¢ fee for each discharge so furnished.

May 25, 1962



Honorable Floyd L. Sperry, Jr.
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Sperry:

Your inquiry concerning fees of recorders in counties of the third class reads as follows:

"I would like an opinion concerning the following matter having to do with the fees of recorders in Counties of the Third Class in this State.

"Section 59.490 of the Revised Statutes of Missouri, 1959 in sub-section one (1) provides that it is mandatory that the recorder furnish to veterans one copy of the veterans discharge if that discharge has been recorded. Subsection two (2) of the same section provides that the recorder shall be paid by the County the sum of 50¢ for 'each certified copy of the discharge that he furnishes'.

"I would like your opinion as to whether the County Court in their discretion may instruct the Recorder to give as many as two copies of a veterans discharge to him and whether they may pay the recorder 50¢ each for the same either under the above noted language found in sub-section two (2) or under other powers of the County Court in administering the business of the County."

Your inquiry involves primarily an interpretation of Section 59.490, RSMo 1959. This section provides that the

Honorable Floyd L. Sperry, Jr.

recorder shall furnish to veterans one certified copy of the discharge upon request of the veteran and that the recorder shall be paid by the county the sum of 50¢ for each certified copy of the discharge that he furnishes. You inquire as to whether the recorder can furnish additional certified copies and charge 50¢ for each of these additional copies furnished to a single individual veteran.

The above cited section provides that the recorder shall furnish one certified copy of the discharge upon request of the veteran and in the same section provides that this 50¢ fee shall not be deemed to be an accountable fee. It thus appears from this phraseology that the legislature has provided for the receipt by each veteran of the one free certified copy of his discharge for which the recorder shall receive 50¢ as an unaccountable fee. Both on the question of the number of free certified copies of the discharge that can be supplied and on the question of the fee for that one discharge being unaccountable the legislature has indicated what should be the public policy of this state. It is our view that the provisions of Section 59.490 referred to above do provide for one certified copy to be furnished the veteran and that Section 2 of such section in reference to "each certified copy of discharge" refers to the previous one free copy.

Further, the County Court is authorized only to do that which the statutes authorize the Court to do or is necessarily implied therefrom. Since there is no authorization for the County Court to make such payments over and above the one discharge, it is prohibited from so doing.

We must keep in mind that statutes which provide for compensation to public officers are customarily strictly construed against such officers. (See *Nodaway County v. Kidder*, 123 S.W. 2d 857, 344 Mo.) Under the above cited statute it is made the duty of the recorder to furnish one certified copy, upon request, of the veterans discharge for which the recorder shall receive 50¢. If we interpret this section as permitting the furnishing of two or any number of additional copies, then the terminology providing for one copy would become surplusage. Thus it follows that the recorder is entitled only to the one 50¢ fee in connection with furnishing a free certified copy of the veteran's discharge to each veteran on his list.

Honorable Floyd L. Sperry, Jr.

CONCLUSION

Therefore it is the opinion of this office that the recorder in third class counties is required and permitted to furnish only one free copy of a veteran's discharge on his request to be paid for by the County Court, if such discharge has been recorded, and the recorder is permitted to retain the one 50¢ fee for each discharge so furnished.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CB:ms

April 3, 1962

144

Honorable John E. Downs
Senator, 34th District
510 Corby Building
St. Joseph, Missouri

Dear Senator Downs:

You recently requested the opinion of this office
as follows:

"Would you be so kind as to give me your
opinion concerning stock issued by a not-
for-profit corporation organized under the
Missouri Not-For-Profit Corporation Act
of 1953?

"The Act seems to clearly indicate that
not-for-profit corporations cannot issue
stock, and therefore, would you give me
your opinion as to whether or not these
certificates of stock issued by the
corporation would be mere evidence of
membership, and, if so, could the Board
of Directors at a meeting, or at a
meeting of all the shareholders or
members, could these stock certificates
be withdrawn or membership canceled for
failure to pay dues or assessments?"

Subsequently, you furnished us with additional specific
information concerning the corporation involved. The Articles
of Incorporation make no reference to shares or certificates
of stock, nor do they contain any provisions respecting

Honorable John E. Downs

classification of members or the qualifications and rights of any such class. The By-Laws contain a number of provisions referring to "certificates of stock" and to "stockholders". Article IV provides that "membership in the corporation shall be evidenced by a certificate of stock issued to the purchaser for the sum of One Hundred Dollars." Article V provides for "transfer of stock". Articles XII, XV and XVI refer to "certificates of stock". Article VI, VII, VIII, IX, XVIII and XIX have application to stockholders meetings.

The stock certificate itself is in the usual form of stock certificates of corporations which are organized under the General and Business Corporation Law of Missouri, except that no reference is made therein to any par or no par value nor to any amount of authorized capital stock.

Section 355.030, RSMo 1959, contains the express mandate that a corporation organized under, or which has accepted the provisions of The General Not-for-Profit Law "shall not have or issue shares of stock". This explicit statutory provision of itself would operate to invalidate every share of stock issued by a not-for-profit corporation.

It is to be noted that Section 355.105, RSMo 1959, provides that such corporation "may issue certificates evidencing membership therein". Article IV of the By-Laws above noted (stating that "membership in the corporation shall be evidenced by a certificate of stock") would indicate that the intention is simply that the "stock" certificates constitute no more than the "certificate evidencing membership" which is authorized by Section 355.105. However, the use of the words "stock" and "share" in connection therewith is unauthorized by law and void, although such fact does not of itself necessarily invalidate the "certificate" to the extent that the corporation could not replace it with a valid one in conformity with the intention.

The law "will not presume that the parties intended to do an illegal and unlawful act". (Allstate Ins. Co. v. Hartford Accident & Ind. Co., Mo. App., 311 SW2d 41, 47). On the contrary the presumption is that the parties intended to act honestly and rightfully (Bradshaw v. Metropolitan Life Ins. Co., Mo. App., 110 SW2d 834, 837; State ex rel Kugler v.

Honorable John E. Downs

Tillotson, Mo. Sup., 312 SW2d 753, 757). We note that the By-Laws (Article IX) provide that each shareholder is entitled to one vote, and that no provision is made therein for the payment of any dividends, which would reinforce our view that the parties intended that the "stock" certificates be no more than "certificates evidencing membership". The reference in Article IV to a "purchase" price of \$100 may be considered as the equivalent of an initiation charge for membership.

Under the circumstances, we would suggest that all the "stock" certificates purporting to evidence "shares" in the corporation be immediately withdrawn or cancelled and replaced by true certificates of membership. So too, we suggest that all references to stock, certificates of stock, and stockholders meetings be deleted from the By-Laws.

Your inquiry also relates to the effect of a failure on the part of a member to pay dues or assessments. Section 355.105 RSMo 1959, provides in part that not-for-profit corporations may have one or more classes of members, and that the designation of such class or classes and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation or the by-laws. In the case of the corporation concerning which you inquire, the Articles of Incorporation are silent on this subject. The By-Laws contain provisions for two classes of members, one class being those who have "purchased" stock certificates and the other class being designated as "associate members". The latter have no voting privileges.

We believe that the by-laws of such corporation may make provision for reasonable annual dues or assessments and specify the consequences of non-payment. With respect to voting members, Article XIX of the By-Laws limits the annual assessment to a maximum of \$20.00 unless such amount is increased by a majority vote of the members present at a special or annual meeting. Article XIV provides that members shall pay assessments within three months of the date of levy and that upon making such payment shall be issued a membership card for the ensuing year. This card merely evidences that the member in question is in good standing for the current year.

You inquire whether the Board of Directors or the stockholders at a meeting may "cancel" membership or "withdraw" a stock certificate for failure to pay dues or assessments.

Honorable John E. Downs

We find no provision either in the Articles of Incorporation or the By-Laws which would authorize such a procedure. Article XIV of the By-Laws provides that if a member fails to pay his assessment within three months, he "shall be denied access to the property of the corporation and to all the privileges of a member of the corporation." This Article, in essence, provides only for a suspension of the privileges of membership, and not for an expulsion or revocation of membership in the event of failure to pay an annual assessment. We note that Article XII of the By-Laws authorizes the Board of Directors, by unanimous agreement, to "expel any member whose conduct it deem unbecoming and detrimental to the corporation, and shall refund to any such expelled member the price of his share of stock." This Article clearly has no reference to a mere failure to pay dues or assessments, and in our opinion would not authorize a cancellation or revocation of a membership based solely on failure to pay an annual assessment.

The foregoing opinion is obviously limited to the specific facts submitted with reference to the not-for-profit corporation concerning which you make inquiry. In situations of this kind, a change in the factual situation might well result in different conclusions. We desire to emphasize, however, the fact that under the applicable statutes no corporation organized as a not-for-profit corporation may legally issue shares of stock.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

March 26, 1962

FILED
147

Honorable Basil V. Jones
Representative, Cass County
Pleasant Hill, Missouri

Dear Mr. Jones:

This is to acknowledge receipt of your letter under date of March 14, 1962, in regard to whether it is possible for the city government of East Lynne to levy a city tax on motor cars and motor trucks.

Section 301.340, RSMo 1959, states as follows:

"1. Municipalities, by ordinance, may levy and collect license taxes from the owners of and dealers in motor vehicles, residing in such municipalities, and may require the display of license plates or stickers. Municipal license taxes, including the cost of plates, stickers and notarial fees shall not exceed the following amounts:

"(1) For motor vehicles other than commercial motor vehicles

Less than 12 horsepower.....	\$2.50
12 horsepower and less than	
24 horsepower.....	3.50
24 horsepower and less than 36	
horsepower.....	5.50
36 horsepower and less than	
48 horsepower.....	7.50
48 horsepower and less than	
60 horsepower.....	8.50
60 horsepower and less than	
72 horsepower.....	10.50
72 horsepower and more.....	12.50
Motorcycles.....	2.00
Motortricycles.....	2.50

Honorable Basil V. Jones.....March 26, 1962

"(2) For commercial motor vehicles having a manufacturer's rated capacity of

Less than 2 tons.....\$3.50
2 tons and less than 5 tons..... 6.00
5 tons and less than 6 tons..... 9.00
6 tons and less than 7 tons.....10.00
7 tons and less than 8 tons.....12.00
And for every ton or major fraction thereof in excess of 8 tons, \$5.00 per ton.

"2. No municipal license tax shall be collected from a resident of any municipality for motor vehicles used exclusively outside of such municipality, and that fact may be shown by an affidavit of the motor vehicle owner for the purpose of securing a state registration certificate without producing a receipt for municipal license taxes. When the owner of any motor vehicle or trailer, or chauffeur or registered operator shall have complied with the requirements of this law he shall not be required to pay any license tax or fee to any municipality, or to submit to any other requirement, except as authorized by this law, in any municipality of this state.

"3. Municipalities may impose occupation taxes on the business of transporting passengers, freight and merchandise for hire carried on within their limits, and may measure such taxes by the number of motor vehicles engaged in such transportation."

It is evident, therefore, from the aforesaid sections, that a municipality of the fourth class by ordinance may levy and collect license taxes from the owners of and dealers in motor vehicles residing in such municipalities and may require the display of license plates or stickers. These municipal license taxes, however, including the cost of the plates, stickers and notarial fees shall not exceed the amounts as stated in the preceding section.

If we can be of any further service, please advise.

Yours very truly,

PS:BJ

THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of Central Allied
Life Insurance Company.

OPINION NO. 148

March 30, 1962



Honorable Jack L. Clay
Superintendent, Division of
Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

This opinion is in answer to your letter of March 14, 1962 with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Central Allied Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. We have also examined proof of publication of the aforesaid documents as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Section 376.010 to 376.670 RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'M:at

April 3, 1962

150

Honorable J. R. Eiser
Prosecuting Attorney
Holt County
Oregon, Missouri

Dear Mr. Eiser:

This is in response to your request for an opinion dated
March 14, 1962, as follows:

"I would like to have the opinion of your
office as to what mileage the Juvenile
Officer is entitled to charge for miles
traveled by him in his official capacity.

"Said Juvenile Officer was appointed by
the Judge of the Juvenile Court under the
Provisions of Section 211.351 R.S.
Missouri, 1959."

The authority for paying juvenile officers travel expense
is found in Section 211.391.2, RSMo 1959, wherein it is
provided that:

"Actual expenses, including a mileage
allowance not to exceed that amount
allowed state officers for each mile
traveled on official business * * *
shall be reimbursed to them out of the
funds of the county or counties."

The amount paid state officers is established by the
Comptroller under Section 33.090, RSMo 1959, which gives him
authority to promulgate rules and regulations governing the
payment of reasonable and necessary travel expenses incurred
on behalf of the state, and the rate which he has currently
established for mileage is eight cents per mile.

Trusting that this will answer your problem, I remain

Yours very truly,

HLM:BJ

THOMAS F. EAGLETON
Attorney General

OPINION NO. 156 ANSWERED BY LETTER.

April 18, 1962

FILED
156

Mr. June R. Rose
Chairman, Industrial Commission
of Missouri
State Office Building
Jefferson City, Missouri

Dear Mr. Rose:

This is in response to your letter of March 16, 1962, in which you inquire as to the applicability of the Prevailing Wage Law (Sections 290.210 through 290.310) to the University of Missouri.

You previously made a similar inquiry of this office to which inquiry we responded by forwarding you two Attorney General opinions which analyzed two acts of the legislature as to whether such acts were applicable to the University of Missouri in light of what is now Article IX, Sec. 9 (a) of the 1945 Missouri Constitution.

Article IX, Sec. 9 (a) reads as follows:

"The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

In the opinion of January 29, 1934 to Orville M. Barnett, Attorney General McKittrick considered the applicability of the State Purchasing Agent Act (now Sec. 34.010 et. seq.) to the University of Missouri in light of the language in the Missouri Constitution now contained in Article IX, Sec. 9 (a). The ruling was that said constitutional provision prevented the Purchasing Agent Act from applying to the University of Missouri.

Mr. June R. Rose

In the opinion of December 19, 1955 to DeVere Joslin, Attorney General Dalton considered the same constitutional provision in connection with the investment of funds by the Board of Curators of the University.

In both opinions, the word "government" as found in the aforementioned constitutional provision was seemingly given a very broad interpretation.

It would appear that that the rationale of these two opinions would apply to the instant question in so far as determining the applicability of the Prevailing Wage Act to the University of Missouri in light of Article IX, Sec. 9 (a) of the Missouri Constitution.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

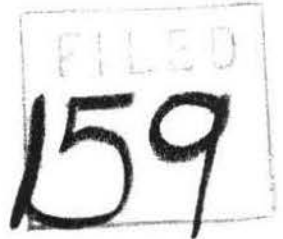
CB:jh

CANDIDATE:
BALLOT:

The "full name" of a candidate appearing on an official ballot may when warranted include prefix "Mrs." and suffix "Sr." and "Jr." but may not use prefix "Dr." for a doctor included in Section 564.290 RSMo.

April 18, 1962

Opinion No. 159



Honorable Warren E. Hearnest
Secretary of State
Jefferson City
Missouri

Dear Mr. Hearnest:

We are in receipt of your request for an opinion as follows:

"The office of Secretary of State formally request an opinion clarifying this situation.

Is it permissible and if so under what conditions and limitations can the prefix "Doctor" be placed on the ballot."

The answer to your question involves a construction of the Missouri election laws. The basic section of the statute is Section 120.340, RSMo 1959, which provides in part that the name of no candidate shall be printed upon any official ballot at any primary election unless such candidate in due time has filed a written declaration "stating his full name" etc. A number of other statutory provisions refer to the "name" of the candidate. For example, Section 120.380 requires the Secretary of State to transmit to the county clerks a certified list containing the name of each person who has filed declaration papers in his office; and Section 120.420 provides for an official ballot on which "the names of all the candidates who shall have filed declaration papers" shall be printed.

Honorable Warren E. Hearnnes

The "name" to be printed on the ballot can be only the "full name" which must be stated by the candidate in his declaration of candidacy. Your request involves a determination of the legislative intent in requiring that the "full name" of the candidate be stated in the declaration and printed on the ballot.

Section 1.090, RSMo 1959, provides: "Words and phrases shall be taken in their plain and ordinary and usual sense." In a case involving the use of the word "name" in a statute relating to the assessment of personal property (State ex rel Lane v. Cornell, Mo. Sup., 149 SW2d 815, 821) Judge Dalton stated:

"A person's name is the designation ordinarily used, and by which he or she is known in the community. Names are used as a method of identification. Whether the identification is sufficient is ordinarily a question of fact."

The foregoing statement accords with the usual concept of a name, that is, that it is the distinctive characterization by which the person is generally known and distinguished from others. However, mere description is not usually recognized as the equivalent of a name. See 65 C.J.S. Names §1, p. 2. By the common law, a person's "legal" name has consisted of one given name and one surname or family name. 65 C.J.S. §3, p. 2. It is also the general rule that prefixes such as "Dr.", "Mr." and "Mrs." are mere titles descriptive of the person referred to but are not names or parts of names. So too, a suffix such as "Sr.", "Jr." or some other word or numeral of similar import added to a name is ordinarily not a part of the person's name but is generally considered a matter of description adopted for convenience. 65 C.J.S., Names §5, pp. 6-7. In Hunt v. Searcy, 167 Mo. 158, 67 SW 206, 208, the court ruled this matter as follows:

"The addition or suffix 'Sr.' is no part of the name of a person. Neil v. Dillon, 3 Mo. 59. 'The abbreviations "Jr." and "Sr." are no part of the name proper.' 1 Enc. E. & Prac.

Honorable Warren E. Hearnes

(Ed. 1895) pp. 46, 47, and a great number of cases cited in note 3, where it is said, 'The commonly abbreviated prefixes and suffixes are not considered either as names in themselves, or as parts of names.'

We have found no Missouri case which concerns the use of the title "Doctor" or "Dr." in connection with the name of a person. Other states have considered this question. Thus, in *Hamilton v. Shredded Wheat Sales*, 54 R.I. 285, 172 A. 614 the court stated:

"In the above entitled action we note that the name of the plaintiff appears as 'Dr. James Hamilton'. The designation 'Dr.' is a title and is no part of the name of the plaintiff. It is therefore improper pleading so to designate the plaintiff."

And in *Gears v. State*, 203 Ind. 3, 176 N.E. 553, the Court ruled:

"The evidence in this case justifies us in saying that the letters 'Dr.' have a well understood meaning, and when used as a prefix, as in the affidavit before us, they serve as a description but do not add to and detract from the true name of a person."

A number of authorities have ruled that the prefix "Mrs." is a mere title and no part of the person's name. Thus, in *Feldman v. Silva*, 54 R.I. 203, 171 A. 922, it was said:

"The designation of 'Mrs.' is a mere title and is no part of petitioner's name."

In *Carlton v. Phelan* (Fla.) 131 So. 117, the court stated:

"The prefix [Mrs.] is not a name, but a mere title that usually distinguishes the person referred to as a married woman."

Honorable Warren E. Hearnnes

The Cornell case, noted above, was a certiorari proceeding involving the validity of an assessment of a personal property tax against the estate of "Mrs. N. B. Wilson". The decedent's "true" name was Sarah L. G. Wilson. The name of her late husband was Newton R. Wilson, and it was contended that the decedent was known as Mrs. N. B. Wilson. The Court held that the order of the county board of equalization assessing the tax in the name of Mrs. N. B. Wilson was not void on its face.

That case involved a tax statute which usually requires more specificity in names. It is to be noted, however, that the court referred to the absence of language in the statute which would require that such assessments of personal property be in the "full, true, and lawful name of the owner". On the other hand, the statute which is involved in the present matter (Section 120.340) does require the candidate to state his "full name". We do not believe, however, that the word "full" was intended to be literally applied. In our view, the statute does not require the use of one's "legal" name in the common law sense, nor does it necessarily exclude the use of prefixes or suffixes.

In State ex rel Public Service Co. v. Cowan, 356 Mo. 674, 203 SW2c 407, 408, Judge Hyde speaking for the court stated:

"After all, a name is only what one calls himself for purposes of identification.
See 45 C.J. 367, Sec. 1."

In State v. Deppe, Mo. Sup., 286 SW2d 776, 781, it was said:

"A person's name is the title by which habitually he calls himself and others call him * * *"

See also Ohlmann v. Clarkson Sawmill Co., 222 Mo. 62, 120 SW 1155, 1157.

Election laws should be construed liberally to avoid unduly restricting and circumscribing the right of a citizen to be a candidate for office. See State ex rel Haller v. Arnold, 277 Mo. 474, 210 SW 374, 376, in which the court referred to "the untrammelled constitutional privilege of all eligible persons to become candidates for office." This privilege should not be hedged about "with such conditions as materially to impinge upon the guarantee of the Constitution that 'all elections shall be free and open.'"

Honorable Warren E. Hearnnes

In *Preisler v. City of St. Louis, Mo. Sup.*, 322 SW2d 748, 753, the court said:

"We agree that every eligible person has the right under the constitutional guarantee of free and open elections to become a candidate for office (citing cases); and that restricting that constitutional right in such manner as to effectively deny and improperly impede it is a violation of the guarantee..."

Candidates should have the right, absent compelling reasons to the contrary in a particular situation, to have his name placed before the electorate in such manner that his true identity is disclosed, not concealed. The best way to effectuate the purpose of our election laws and the constitutional guarantees relating to elections is to construe the words "name" and "full name" in accord with Judge Dalton's definition above quoted, namely that "a person's name is the designation ordinarily used, and by which he or she is known in the community."

The foregoing concept was expressed in *Huff v. State Election Board*, 168 Okla. 277, 32 P. 2d 920, 93 ALR 906, in which the court sustained the right of a woman (married to I. L. Huff) to have her name printed upon the official primary ballot as "Mrs. I. L. Huff". The contention was that "Mrs." was a mere title and not a part of the candidate's name and therefore could not be adopted by her as such. The applicable statute provided for the candidate to file a declaration stating "name in full as desired on the ballot." The Court ruled as follows:

"There are frequently many candidates for the several elective offices and the voters are only acquainted with them or many of them by the names by which they are commonly known and called. That fact was known to the Legislature when it enacted the primary election law and it is clearly the legislative intent that the candidate shall be so identified on the primary and run-off

Honorable Warren E. Hearnes

primary ballot that the voters may know for whom they cast their ballot and not be deceived or misled to vote for some candidate for whom they did not intend to vote, so it is not so much a question as to the true legal name of the candidate as it is that the voter may be informed as to the candidates by the names by which they are commonly known and called and transact their important private or official business.

* * *We shall content ourselves with expressing our adherence to the views of those courts which hold that a person may change his or her name in good faith and for an honest purpose, by adopting a new name and transacting his or her business and holding himself or herself out under the new name, with the acquiescence and recognition of his or her friends, and this right is not abrogated by the Constitution or any statute of this state; and that under the circumstances of this case a married woman has the right to adopt 'Mrs.' as a part of her name with equal propriety as she could an additional Christian or given name or initial."

In *Gearing v. Carroll*, 151 Pa. 79, 24 A. 1045, 1046, the court, citing with approval the earlier Pennsylvania case of *Laflin & Rand Powder Co. v. Steytler*, 146 Pa. 434, 23 A. 215, held that the statutory requirement of a limited partnership act that the "full names" of the members be used "is met by giving the names in the form habitually used by those persons in business, and by which they are generally known in the community." In that case, the "full name" as given by the partner was D.W.C. Carroll, although his legal name was DeWitt Clinton Carroll. The *Laflin* case contains a persuasive exposition on the meaning of the words "full names". It was there said:

"A man's name is the designation by which he is distinctively known in the community.

Honorable Warren E. Hearnes

Custom gives him the family name of his father, and such praenomina as his parents choose to put before it, and appropriate circumstances may require 'Sr.' or 'Jr.' as a further constituent part. But all this is only a general rule, from which the individual may depart if he chooses. The legislature in 1852 provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. But without the aid of that act a man may change his name or names, first or last, and when his neighbors and the community have acquiesced and recognized him by the new designation, that becomes his name. * * * A name therefore, is the title used for the identification of an individual and the intent of its requirement in full is certainty of such identification. The full name, therefore, is no more than the whole of such title as it is used by himself and his neighbors for such purpose. To construe the statute to require the literal and absolute following of the entire list of names a person may have had bestowed upon him would be giving it not only a very narrow and technical construction which serves no purpose of the act, but even one which might tend to defeat its real intent. A statement signed 'Stephen Grover Cleveland' would not create certainty, but doubt as to its author."

We are therefore of the opinion that whether the use of a prefix or suffix constitutes part of the name of a person so that it may be printed upon the official ballot depends upon the facts in each case. In view of the law that a prefix or suffix is not ordinarily a part of a person's name, we believe that the burden would rest upon the person desiring the use thereof (in the event such use was questioned) to reasonably satisfy the appropriate official that such prefix or suffix has in fact been adopted and used as part of his name and that he is generally known and recognized in the community by that name.

Honorable Warren E. Hearnese

With respect to the specific question posed in your letter, this office has heretofore ruled in an opinion issued to Honorable John E. Downs, dated March 25, 1954, that "When a candidate for public office uses, in political advertising and on the voting ballot, the prefix 'Doctor' or 'Dr.' before his name, it must be followed by suitable words or letters clearly designating the degree held by such person, or the particular type of practice in which such person is engaged."

That opinion was based upon the provisions of Section 564.290, RSMo 1959, which prohibits any person licensed to practice medicine, surgery, dentistry, optometry, osteopathy, chiropractic, chiropody or veterinary surgery, or specifically permitted by law to practice the curing, healing or remedying of ailments, defects or diseases of body or mind with or without a license, from using the prefix "Doctor" or "Dr." in connection with his name in various specified situations including any "public listing or display of any nature whatsoever" without affixing thereto suitable words or letters designating his degree or type of practice. We believe that such opinion was correctly ruled insofar as it held that Section 564.290 applied to candidates for public office. It should be noted, however, that the opinion does not discuss or expressly rule the further question of whether our election laws actually authorize the use on official ballots of descriptive matters such as the degree held by the candidate or the particular type of practice in which he is engaged or licensed to practice, but assumes (at least as to municipal elections in cities of the first class) that such use is permissible. In our opinion, the assumption is erroneous.

In *State ex rel Whetsel v. Murphy*, 122 Ohio St. 620, 174 NE 252, it was said:

"This court is of the opinion that it is unlawful to place any characterization or description either before or after the name of a candidate upon a ballot either at the primary or general election where there is not such identity of the names of two or more candidates as to justify some description which will permit the voters to make an intelligent expression of his choice."

Honorable Warren E. Hearnes

That case ruled that the use of the letters "M. D." which were appended after the name of a candidate for coroner was improper. We agree with such conclusion. There is no authority in our election laws which would permit the use of descriptive matter such as M. D., O.D., D.D.S., Christian Science Practitioner and the like in addition to the name of the candidate. In our opinion, the "name" of a person may not reasonably be held to include as part thereof either the degree he holds or any other purely descriptive matter.

CONCLUSION

The "full name" of a candidate, to be printed on the official ballot is the designation or distinctive characterization ordinarily used by such person and by which he is known and recognized in the community, and may include, when warranted by the facts, prefixes such as "Mrs." and "Dr." and suffixes such as "Sr." or "Jr.". However, the "name" cannot include purely descriptive matter such as the degree held or the occupation in which he is engaged. Since the use of the word "Doctor" or "Dr." would be illegal without designating the degree or type of practice, a doctor included in Section 564.290, RSMo 1959, may not use such prefix as part of his name for use on the ballot.

The foregoing opinion, which I hereby approve, was prepared by my assistant Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

OPINION NO. 164, Answered by Letter
Joseph Nessenfeld

164

April 13, 1962

Honorable Warren E. Hearnes
Secretary of State
Jefferson City
Missouri

Dear Mr. Hearnes:

You have requested the opinion of this office as follows:

"If the initiative process is used in 1962 to propose an amendment to the Missouri Constitution to be voted upon at the General Election in 1962, please advise me if I would be correct in requiring that said petitions be signed by eight percent of those voters voting for John M. Dalton at the General Election in 1960 in each of two-thirds of the Congressional Districts set out in CSHCSSCSB No. 363 as passed by the 71st General Assembly."

Section 50, Article III of the Constitution provides that initiative petitions proposing amendments to the Constitution shall be signed by eight percent of the legal voters in each of two-thirds of the Congressional Districts of the state. Under Section 53, Article III of the Constitution the total vote for governor at the general election last preceding the filing of any initiative petition shall be used to determine the number of legal voters necessary to sign the petition.

Under the 1950 census, Missouri was entitled to eleven representatives in the House of the Congress of the United States.

Honorable Warren E. Hearnes

Pursuant to the mandate of Section 45, Article III of the Constitution, the General Assembly divided the state "into districts corresponding with the number of representatives to which it is entitled", that is, eleven.

Under the 1960 census, Missouri will be entitled to only ten representatives in the 88th and four succeeding Congresses. Again, pursuant to Section 45, Article III of the Constitution the 71st General Assembly divided the state into ten districts from each of which a representative will be elected at the next ensuing general election to serve in the 88th Congress.

In our opinion, except for the purpose of preparing for the election of such representatives, the new congressional districts have no existence as such at the present time. Until the 88th Congress, Missouri will still have eleven representatives in Congress, each of whom was elected from a district as theretofore established. In the event of a vacancy in the office of any such representative, his successor to fill the unexpired term would be elected from whichever of the eleven districts the vacancy occurred. Hence, these eleven districts necessarily remain in existence as Congressional districts until January, 1963.

A congressional district within the meaning of Section 50, Article III of the Constitution is one which is presently entitled to a representative in Congress. The newly created congressional districts are not presently entitled to elect a representative in Congress. They are effective only with respect to the 88th and succeeding congresses. It is true that the Act which establishes the ten new congressional districts also repeals those sections of the statutes which established the eleven districts. However, in our opinion, such repeal does not operate to abolish the existence of the eleven districts for all purposes. This becomes evident when it is realized that the authority to establish ten, rather than eleven, districts exists only with respect to the election of representatives in the 88th and succeeding Congresses. Missouri could not validly establish ten districts except prospectively.

Honorable Warren E. Hearnes

initiative and

In our opinion, therefore, the congressional districts which must be considered for the purpose of determining the sufficiency of referendum petitions are those congressional districts from which the eleven existing representatives in congress from Missouri were elected. CSHCSSCSSB No. 363 passed by the 71st General Assembly should be considered as prospective in operation only, and the districts thereby created are effective as such within the meaning of Section 50 of Article III of the Constitution only after the expiration of the terms of the present eleven representatives in Congress from Missouri.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

INSURANCE: Articles of Incorporation of Permanent Life
Insurance Company

April 5, 1962



Honorable Jack L. Clay
Superintendent, Division of
Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

This opinion is in answer to your inquiry of March 28, 1962, with which you submitted to this office an executed copy of declaration of intention of original incorporators of the proposed Permanent Life Insurance Company, which declaration of intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JLO:mat

THOMAS F. EAGLETON
Attorney General

CIRCUIT COURT:
COUNTIES:
JUVENILE OFFICERS:
JUVENILE COURTS:
OFFICE EXPENSES:

Third and fourth class counties, comprising one or more judicial circuits and served by juvenile officials appointed by the Circuit Court, must pay office expenses of said juvenile officials, which are approved by the Circuit Court, by prorating said expenses among the counties served upon a ratio determined by population of the respective counties.

May 17, 1962

OPINION No.
166[1962].

Honorable Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Mr. Hoff:

This is in reply to your opinion request of April 2, 1962.

In said letter you advise that Cedar County is a fourth class county, and one of four counties comprising the 26th Judicial Circuit of Missouri; that the Circuit Judge has appointed a Juvenile officer to serve all four counties in this circuit; that an estimated budget, including office expenses for 1962, has been prepared by the Juvenile officer, approved by the Court, and submitted to the County Court.

You then submit the following question:

"Must a county of the Fourth Class pay its part of the office expense of the Juvenile Officer appointed by the Circuit Judge under Section 211.351 in view of Paragraph 2 of Section 211.391?"

The position of "Juvenile Officer" is solely statutory and created by Section 211.351, RSMo 1959, which states in part as follows:

"1. The juvenile court shall appoint a juvenile officer and other necessary juvenile court personnel to serve under the direction of the court in each county of the first and second class and the circuit judge in cir-

Honorable Lewis B. Hoff

cuits comprised of third and fourth
class counties

"(1) May appoint a juvenile officer and other necessary personnel to serve the judicial circuit;
or * * *

The language of said section clearly indicates that said Juvenile Officer is to serve under the direction of the Juvenile Court, which by definition in Section 211.021(3), RSMo 1959, means the Circuit Court of each county (Fourth Class County).

Section 476.260, RSMo 1959, states:

"The court shall audit and adjust the accounts of the sheriff or other officer attending it, and certify the same for payment."

In view of this section, the accounts of the Juvenile officer should be submitted to the Circuit Court, who shall audit, adjust, if necessary, and certify the same for payment.

In addition, Section 476.270, RSMo 1959, provides that the expenditures of the Circuit Court, except salaries payable by the state, are to be paid out of the county treasury in which the court is held. Said section states, in part:

"All expenditures accruing in the circuit courts, - - -, except salaries and clerk hire which is payable by the state, shall be paid out of the treasury of the county in which the court is held in the same manner as other demands."

Ordinarily, therefore, the county treasurer of any county in the circuit in which the Circuit Court is held would be obligated to pay the county's prorata share of the office expense of the Juvenile officer if audited and certified for payment to the county by the court.

Subsection 1 of Section 211.341, RSMo 1959, provides, in part, as follows:

Honorable Lewis B. Hoff

"Counties of the third and fourth classes within one judicial circuit, shall, upon the written recommendation of the circuit judge of that judicial circuit, establish a place of juvenile detention to serve all of the counties within that judicial circuit, and in like manner, the counties shall supply offices for the juvenile officers of that circuit . . ."
(Underlining supplied)

In addition, said subsection further provides:

". . . except that the total cost of establishment and operation of the places of detention shall be prorated among the several counties within that judicial circuit upon a ratio to be determined by a comparison of the respective populations of the counties. The point of location of the place of juvenile detention shall be determined by the circuit judge of the judicial circuit."

The language of subsection 1 of Section 211.341, RSMo 1959, not only directs that third and fourth class counties supply offices for the juvenile officers of the circuit, but also provides that this shall be done "in like manner" as the establishment of places of detention in these counties.

Because of this language and the fact that the subsection provides that the total financial costs of said places of detention must be prorated among the counties within the judicial circuit according to their population, and that the circuit judge of the judicial circuit shall determine the location of the place of juvenile detention, the same provisos would be applicable to the expenses, costs, and location of the juvenile offices within the circuit.

It is contended, however, that Subsection 2 of Section 211.391 precludes these counties from liability for

Honorable Lewis B. Hoff

office expenses of the Juvenile officer or other juvenile court employees. Said subsection 2 states:

"2. Actual expenses, including a mileage allowance not to exceed that amount allowed state officers for each mile traveled on official business but exclusive of office expense, incurred by the juvenile officer and deputy juvenile officers while in the performance of their official duties shall be reimbursed to them out of the funds of the county or counties."

The language of said section merely states that the Juvenile officer or Deputy Juvenile officers are to be reimbursed for their "out of pocket" expenses, including mileage, actually incurred by them in the performance of their official duties by the third or fourth class counties served. However, office expenses shall not be "reimbursed" to them.

In other words, "office expenses" under this section are not considered actual expenses for the purpose of personally repaying them to the Juvenile officer or Deputy Juvenile officers.

Said section does not state, however, that the counties are not liable for office expenses.

A further look at Section 211.391, RSMo 1959, indicates that this section deals primarily with (payments) to juvenile court personnel. In this regard, the legislature saw fit to personally reimburse juvenile officers for the expenses enumerated in this section and incurred by these individuals in the performance of their official duties. However, in specifically excluding office expenses, the legislature was mindful of Section 211.341, RSMo 1959, which characterized said expenses as those payable by the counties, not as a personal item (payable) to the juvenile officers, but as a budgetary item connected with the proper function of the circuit court, and subject to the approval of said court.

Thus, Section 211.391, RSMo 1959, cannot be used as an authority for relieving third and fourth class counties

Honorable Lewis B. Hoff

from their obligation to pay the office expenses of juvenile officials (which are approved by the circuit court) and imposed by Section 211.341, RSMo 1959.

CONCLUSION

It is the opinion of this office:

(1) That pursuant to Subsection 1 of Section 211.341, RSMo 1959, third and fourth class counties, which comprise one or more judicial circuits and are served by juvenile officials appointed by the Circuit Court, must pay the office expenses of the juvenile officials which are approved by the Circuit Court by prorating said expenses among the counties served upon a ratio determined by the populations of the counties;

(2) That Subsection 2 of Section 211.391, RSMo 1959, only exempts second, third and fourth class counties from personally reimbursing the Juvenile Officer and Deputy Juvenile Officers for incurred office expenses, but does not exempt said counties from generally being liable for their office expenses incurred and approved by the Circuit Court.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

Copy sent to Honorable Jack P. Pritchard
Judge, 28th Judicial Circuit
Nevada, Missouri

COLLECTOR, CITY:
COLLECTOR, COUNTY:
COUNTIES:

Collector of city of third class responsible for collection of delinquent real estate tax of such city. County collector under no duty to collect delinquent real estate taxes in city of third class.

April 19, 1962

Honorable Joe R. Ellis
Prosecuting Attorney
Barry County
Cassville, Missouri

FILED
172

Dear Mr. Ellis:

This is in response to your recent request for an opinion, which request reads as follows:

"The county collector of Barry County has been requested by the City of Monett, a duly incorporated city lying within the boundaries of Barry County, the same being a third class city, to take action as county collector as follows: Said city, having submitted to the county collector a list certified to by the city collector of delinquent real estate taxes within the city boundaries, requests that the county collector proceed to collect these taxes and if unable to collect the same, to advertise and sell said real estate for delinquent taxes in the same manner as if the real estate were subject to delinquent county taxes.

"Barry County is a third class county. I believe that sections 140.680 and 140.670 are applicable in this matter. I find that cases deciding this question directly are not clear. I might mention that the case of Gilmore et al v. Hibbs 152 SW 2nd 26 deals to some extent with this problem.

Honorable Joe R. Ellis

"My specific question is as follows:
When a request is made by a city as
aforementioned to the county collector
to perform the above duties, must the
county collector proceed and is it his
duty to proceed as requested."

Section 140.680, RSMo 1959, provides:

"The power to collect such city or
incorporated town tax or special as-
sessments before sale is hereby given
to the county collector after said
delinquent list is received by him.

However, that section is limited in operation to the cities
and incorporated towns included in the classification of
Section 140.670, RSMo 1959, Subsection 1 of which provides:

"The collectors of all cities and
incorporated towns having authority
to levy and collect taxes under their
respective charters or under any law
of this state, which return their
delinquent tax lists to the county
collector to collect, shall, on or
before the first Monday in March,
annually, return to the county col-
lector a list of lands and lots on
which the taxes or special assess-
ments levied by the city or incor-
porated town remain due and unpaid."
(Emphasis supplied.)

Hence, the question then is whether the City of Monett,
as a third class city, returns its delinquent tax lists "to
the county collector to collect". We believe it does not
and that the Barry County Collector is under no duty to act
upon the request of the City of Monett in this instance.

Our holding on this question is based primarily on the
case which you cite in your letter, *Gilmore v. Hibbs*, (Mo.
Sup. 1941) 152 SW2d 26. In that case, the former owners
of real property located in Carthage brought suit to quiet
title to that property after it had been sold at a delinquent

Honorable Joe R. Ellis

tax sale conducted by the city collector. Like Monett, Carthage was a city of the third class.

In ruling against the former owners, the Court clearly established the principle that cities of the third class are not among those cities "still returning their delinquent taxes to the county instead of city officers" and that collectors of such cities are the proper parties to conduct sales of real estate for the collection of delinquent taxes.

The Court said at page 27:

"Court en banc in State ex rel. Steed v. Nolte, 345 Mo. 1103, 1104-1106, 138 S.W.2d 1016-1018, upon a consideration of statutory provisions, Secs. 6994-6996, R.S. 1929, Mo. St. Ann. §§ 6994-6996, pp. 5734-5736, now Secs. 7144-7146, R.S. 1939, applicable to cities of the fourth class and identical in all material respects to the above-quoted provisions of Secs. 6780 and 6781, applicable to cities of the third class, held that the city of Clayton, a city of the fourth class, should collect its taxes in the manner provided by the Jones-Munger law. Appellants do not question the soundness of State ex rel Steed v. Nolte. The same result follows with respect to the collection of taxes by cities of the third class generally."

Inasmuch as Sections 6780 and 6781 referred to above contain, for the purposes of this opinion, substantially the same provisions as are now found in our present Sections 94.150, 94.160, and 94.170, we have no hesitancy in holding that the city collector of a city of the third class, rather than the county collector, bears the responsibility of collecting delinquent taxes and conducting the sales necessary to accomplish this end.

Even without the benefit of the Gilmore case, it would be difficult to place any other interpretation on Section 94.170, RSMo 1959, which provides with relation to the duties of collectors of cities of the third class:

Honorable Joe R. Ellis

"1. The city council shall require the collector, at the first meeting of the council in April of each year, or as soon thereafter as may be, to make out, under oath, lists of delinquent taxes remaining due and uncollected for each year, to be known as 'the land and lot delinquent list' and 'the personal delinquent list'.

"2. At the meeting at which the delinquent lists are returned, or as soon as may be thereafter, the council shall examine carefully the delinquent lists, and if it appears that all property and taxes contained in the lists are properly returned as delinquent, the council shall approve the lists and cause a record thereof to be entered on the journal, and shall cause the amount thereof to be credited to the account of the collector.

"3. The city council shall return the delinquent lists to the collector, charging him therewith, and he shall proceed to collect the same in the manner provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes."

CONCLUSION

It is the opinion of this office that a collector of a city of the third class is responsible for the collection of delinquent real estate taxes of that city and for conducting sales necessary to accomplish this end, and that the county collector is under no duty to collect such taxes at the request of a collector of a city of the third class.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Albert J. Stephan, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

DRIVER'S LICENSE:
INTOXICATION TEST:

A. The refusal of a resident of Missouri to submit to an intoxication test does not constitute a ground for revocation of his driver's license in this state.
B. The driver's license of a resident of Missouri cannot be revoked if he is acquitted in another state of an offense committed in another state.

Opinion No. 173 - 1962

June 5, 1962



Honorable Dwight Beals
Representative, Jackson County
603 Commerce Building
Kansas City 6, Missouri

Dear Mr. Beals:

In your letter of April 3, 1962, in which you enclose a clipping taken from the Kansas City Star of March 30, 1962, you submit the following questions:

"If a Missouri resident, who has a Missouri driver's license, is arrested in Kansas of the offense that may involve intoxication and refuses to take a test for intoxication, and his driver's license is revoked for that reason and later he is acquitted on a drunken driving charge, will his Missouri license be revoked (a) when such a refusal is made, (b) and will it remain revoked if he is acquitted of drunken driving?"

According to the newspaper clipping you submit, the law of Kansas requires the consent of the driver of a motor vehicle to submit to a chemical test to determine possible intoxication, but if he refuses to consent the penalty is revocation of his driver's license. The Attorney General of Kansas, according to the newspaper clipping, has ruled that an acquittal of a charge of driving while intoxicated does not restore the driver's license which was revoked because the driver refused to submit to the intoxication test.

In Ex Parte Kneedler, 243 Mo. 632, 147 S.W. 983, 1.c. 985, the Supreme Court of this state stated:

Honorable Dwight Beals

"Every person who operates or uses a motor vehicle must be regarded as exercising a privilege, and not an unrestricted right. It being a privilege granted by the legislature, a person enjoying such privilege must take it subject to all proper restrictions."

Thus the privilege of operating a motor vehicle in this state is governed by legislative enactment. The statute providing for the qualifications of applicants, the issuance of licenses, and revocation or suspension of licenses is found in Chapter 302, RSMo 1959, as amended in the 1961 cumulative supplement.

Section 302.160, RSMo 1959, provides:

"The director of revenue is authorized to suspend or revoke the license of any resident of this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur."

Under this section the Director of Revenue in this state is authorized to revoke or suspend the license of a resident of this state when said licensee is convicted in another state of an offense which, if committed in this state, would be grounds for suspension or revocation in this state.

The law in this state does not require a motor vehicle licensee to submit to a test for intoxication. Likewise the refusal to submit to such a test is not a ground for revocation in this state. Therefore, a refusal to submit to such a test in another state, even though it is a ground for revocation in that state, does not constitute a ground for revocation in this state.

As to the second question you submit, Section 302.160, supra, requires a conviction in the other state of an offense which if committed in this state would be grounds for revocation in this state. Under this statute the person must be convicted. Therefore, the driver's license of a resident of this state cannot be revoked in this state when the driver is acquitted of an offense committed in another state.

Honorable Dwight Beals

CONCLUSION

It is our opinion that:

A. The refusal of a resident of Missouri to submit to an intoxication test does not constitute a ground for revocation of his driver's license in this state;

B. The driver's license of a resident of Missouri cannot be revoked if he is acquitted in another state of an offense committed in another state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

MM:BJ

JURORS:
CIVIL COSTS:
TAXATION OF JURORS' FEES:

Section 494.160, RSMo 1959, governs the taxing of jurors' fees in civil cases in St. Louis County. Section 497.185 has no application whatever to St. Louis County.

OPIN. NO. 177.

May 21, 1962



Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri

Dear Mr. Anderson:

You have requested the opinion of this office as to whether the taxing of jury fees as costs in civil cases in St. Louis County is governed by Section 497.185, RSMo 1959, rather than by Section 494.160, RSMo 1959, which is presently being followed in St. Louis County.

Chapter 497 of the Revised Statutes formerly applied to all counties of 450,000 to 800,000 inhabitants. Prior to the 1960 census, only Jackson County came within this classification. The chapter provides that all grand and petit jurors for the circuit and criminal courts shall be selected as provided therein. Section 497.185 was enacted in 1959 by the 70th General Assembly (House Bill No. 556) specifically as an amendment to Chapter 497 and to be inserted as part thereof. It has no general application and is limited by its enactment to Chapter 497 and those counties which may come within such classification.

Chapter 496 formerly applied to counties of 250,000 to 450,000 inhabitants. Prior to the 1960 census, only St. Louis County came within this classification. Under the 1960 census, effective July 1, 1961 (see Section 1.100, RSMo 1959), St. Louis County now has more than 700,000 but less than 800,000 inhabitants.

Hon. Norman H. Anderson

Had there been no amendments to Chapters 496 and 497, Chapter 496 would no longer apply to St. Louis County, and on the contrary, Chapter 497 would in its entirety be applicable. However, by the terms of Senate Bill 258 enacted by the 71st General Assembly, Chapter 496 has been amended so that it now applies to all counties of more than 700,000 inhabitants, and Chapter 497 has been limited in its application to counties having a population of 450,000 to 700,000 inhabitants.

This is not the first time the General Assembly has amended the statutes governing the selection of juries in St. Louis and Jackson Counties in order to prevent a change which would have otherwise resulted from an increase in population. Chapter 496 (originally enacted in 1933, and subsequently amended) formerly governed the selection of juries in counties with 200,000 to 400,000 inhabitants. Under both the 1930 and 1940 census, St. Louis County -- and only St. Louis County -- came within this classification. Chapter 497 at that time applied to juries in counties with 400,000 to 800,000 inhabitants, and therefore had been limited to Jackson County. Under the 1950 census, the population of St. Louis County was 406,349. The 66th General Assembly thereupon amended Chapter 496 to make it still applicable to St. Louis County (Laws 1951, p. 561) and amended Chapter 497 to assure that it would still be solely applicable to Jackson County (Laws 1951, p. 562). This legislative history makes clear the intent of the Legislature that St. Louis County should not be governed by Chapter 497. The evident purpose of Senate Bill 258 was to preserve the status quo theretofore existing in the selection and service of jurors in St. Louis and Jackson counties.

In our opinion, Chapter 497 has no application whatever to St. Louis County in view of the enactment of Senate Bill 258. Inasmuch as said chapter is limited to counties whose population does not exceed 700,000, it cannot now apply to St. Louis County. Section 497.185, which is an integral part of Chapter 497 and therefore can be no broader than the scope of the chapter, is therefore presently applicable only to Jackson County. Section 497.185 provides inter alia for taxing and collecting as other costs "all fees allowed to the jurors who serve in civil cases." In view of the conclusion we have reached, it is unnecessary to express any opinion as to the construction and effect of this section.

Hon. Norman H. Anderson

Chapter 494 of the Revised Statutes contains general provisions relating to juries. This chapter applies to St. Louis County except only to the extent that the provisions of Chapter 496 are inconsistent therewith. There is no provision whatever in Chapter 496 relating to the taxing of jury fees as costs. Hence, Section 494.160 which provides that whenever any jury shall serve in the trial of any case other than criminal there shall be taxed and collected as costs the sum of \$12 as jury fees applies to St. Louis County and governs the amount which may be taxed and collected as costs as jury fees in civil cases.

CONCLUSION

It is the opinion of this office that taxing of jury fees in civil cases in St. Louis County is governed by the provisions of Section 494.160, RSMo 1959, and that Section 497.185 has no application whatever to St. Louis County.

This opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:mc

OPINION NO. 179 ANSWERED BY LETTER.
(Nessenfeld)

July 6, 1962



Honorable Stephen E. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Strom:

This is in answer to your letter requesting our opinion on the following:

"A number of months ago a prisoner in the Cape Girardeau County Jail awaiting a preliminary hearing on a first degree murder charge went beserk and the Magistrate Judge ordered her transferred to State Hospital No. 4 for examination. We have now received a report from the hospital that she is presently a person of unsound mind and the hospital authorities have recommended that she be committed.

"I request your opinion concerning whether the procedure outlined in Section 545.750, relating to the procedure to be followed where a person becomes insane before his trial, can be followed in this case by the Magistrate Court. No information or indictment has yet been filed.

"If the above statutory procedure is not applicable at this time, I would assume that the Probate Court would have jurisdiction in the matter, jurisdiction not having been taken over by the criminal court. I request your opinion concerning this procedure also."

Honorable Stephen E. Strom

In the circumstances described in your letter, it is the opinion of this office that you may follow either of two alternative courses of procedure, namely: (1) To proceed with a preliminary hearing, and if the defendant is ordered held for the circuit court, to file an information (or indictment), after which the circuit court could hold a sanity hearing under its common-law powers, and if the defendant is found insane, postpone the trial until the accused recovers; or (2) to withdraw the complaint if you believe the accused is now in fact of unsound mind, and subsequently file a new complaint when the accused recovers. If the latter alternative is adopted, the probate court would have jurisdiction to act, but not until the complaint has been withdrawn and the proceeding in the magistrate court has been terminated.

State ex rel. Lamar v. Impey, 365 Mo. 437, 283 SW2d 480, ruled that when a person was arrested and held without bail on a charge of murder, awaiting a preliminary hearing, the probate court was without jurisdiction to hold a hearing under Section 202.807, RSMo 1959, which provides for involuntary confinement of persons who are likely to endanger themselves or others. We hold, in accord with that case, that the magistrate court has "jurisdiction of the person (of the accused) to the exclusion of the probate court" during the pendency of the criminal case.

Section 545.750, RSMo 1959, referred to in your letter, expressly provides for and is limited to, a hearing by the circuit or criminal court wherein the person stands charged only where such person, theretofore indicted, "shall after his indictment and before his trial on such charge becomes insane." At the time this statute was enacted, informations were not provided for. In our opinion, the statute should be construed to include informations as well as indictments. However, the statute has no application to your case because the accused became insane before any information had been filed.

The case of In re McWilliams, 254 Mo. 512, ruled that Section 545.750 applied only where the accused became insane after indictment, and that there was no statute providing a procedure for determining the sanity of a defendant who becomes insane after the commission of the offense and before

Honorable Stephen E. Strom

his indictment. The court held, however, that "in the absence of an express statute the rule at common law should prevail", the common-law rule authorizing the trial court to impanel a jury in his discretion to try as a preliminary matter the question of the present insanity of the accused.

In the Impey case, the magistrate proceeded to hold a preliminary hearing, and ordered the accused held for the circuit court. Thereafter, an information was filed. We are of the opinion that such is a proper course for you to follow. The circuit court does not have jurisdiction over the defendant until the information is filed therein, and has no authority under the statute to hold a sanity hearing except in the circumstances there described. There is no authority in the statutes for the magistrate to hold a sanity hearing. After the information has been filed in the circuit court a sanity hearing can be held therein, in the discretion of the circuit court, but not under the provisions of Section 545.750 as above pointed out, but rather under the common-law powers of the circuit court.

Summarizing: The magistrate court has no authority to hold a sanity hearing, but may hold a preliminary hearing on the complaint, and if the defendant is held for the circuit court and an information is filed, the circuit court, in the exercise of its common-law powers, may impanel a jury to determine the present sanity of the accused. During the entire pendency of the case, both in the magistrate court and in the circuit court, the probate court has no authority to exercise jurisdiction over the person of the accused. If you desire a probate court hearing, you must first withdraw your complaint and terminate the proceedings in the magistrate court.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:gm;ml

ELECTIONS:

ELECTION JUDGES:

BALLOT BOXES:

Ballot boxes in third and fourth class counties must be locked in order to comply with the requirements of Section 111.610, RSMo 1959, that they be securely closed and that the election judges are responsible for locking the ballot boxes.

July 31, 1962

Opinion No. 181



Honorable Warren E. Hearnes
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Hearnes:

Reference is made to your request for an official opinion of this office. Said request reads as follows:

"The Secretary of State would like to have an opinion concerning whether ballot boxes in third and fourth class counties must be locked in order to comply with the requirements of Section 111.610, RSMo 1959, that they be 'securely closed' and, if so, who is responsible for locking them."

The purposes and objectives of the laws pertaining to the conduct of elections and related statutes are to protect the security of the ballot as provided for in Section 3 of Article VIII of the Missouri Constitution of 1945; to help protect the public against the corrupt practices and offenses pertaining to elections as enumerated in Chapter 129, RSMo 1959; and to help protect the efficiency, uniformity, and integrity of elections generally.

Section 111.610, RSMo 1959, as cited in your aforesaid inquiry is a part of Chapter 111 of the Missouri Statutes which pertains to the conduct of elections generally and which provides in part as follows:

" * * * the ballot boxes * * * shall be opened and examined before all the judges and clerks and everything removed therefrom; * * * said ballot boxes * * * shall be kept securely closed while the balloting continues * * *"
(Emphasis supplied).

Honorable Warren E. Hearnes

In attempting to determine the true concept of the phrase "securely closed" our attention is directed to statutes relating to the same or similar subject matter and find that Sections 113.330, 113.860, 119.450, RSMo 1959, which are a portion of the conduct of election laws which pertain specifically to St. Louis County, Jackson County and Clay County respectively, state in part that:

" * * * the ballot boxes * * * shall be kept securely closed while the balloting continues until the time of the closing of the polls.
* * * " (Emphasis supplied).

Note these sections as cited also use the phrase "securely closed."

However, Sections 118.460, and 117.540, RSMO 1959, which are a portion of the laws pertaining to the conduct of elections specifically relating to the City of St. Louis and Kansas City, respectively, state generally that ballot boxes shall be "locked" and the keys delivered to one of the judges and shall not again be opened until the close of the polls.

Note that the language of the foregoing statutes specifically pertaining to the aforesaid counties and cities is almost identical except for the use of the terms "locked" and "securely closed." In each instance, the ballot boxes are not to be opened until the time of the close of the polls. As these sections are *pari materia* and should, therefore, be construed together (*City of St. Louis v. Carpenter*, 341 SW2d 786), it would appear unreasonable in view of the aforesaid purposes and objectives of the laws pertaining to elections and the need of uniformity of application therein, that the legislature intended by the use of the said terms "locked" and "securely closed" a different measure of protection for the safety and secrecy of the ballot in the cities than in the counties previously specified. This reasoning also applies to the conduct of election laws pertaining to third and fourth class counties, for though under Section 111.610, *supra*, the ballot boxes when in use are to be opened and exchanged every hour, the statute specifically states that the ballot boxes are to be not only closed but that they are to be "securely closed."

For a further determination of the legislative intent, we find that generally the courts must seek to get the intent of the legislature from the plain and ordinary meaning of the words used, considering the whole act and its legislative history and must seek to promote the purpose and the objectives of the statute, and to avoid any strained and absurd meaning. *St. Louis Southwestern Ry. Co. v. Loeb*, 318 SW2d 246; Section 1.090, RSMo 1959.

Honorable Warren E. Hearnes

Volume 14 of C.J.S. at page 1275 defines "to close" as
" * * * to shut up, so as to prevent * * * access by any person
* * *."

Webster's Second New International Dictionary, unabridged,
defined the following words:

Secure: Safe; as (a) not exposed to danger; as secure
from foes. (b) In safe keeping or possession; secured.

Closed: Shut fast; closed; not open; tight.

Locked: Fastened or united by locking.

Lock: A means or device for fastening or for restraining.

Taking into consideration the foregoing authorities and definitions, the term "securely closed" means in its plain and ordinary sense that the ballot box must not only be closed (that is, shut fast) but must be closed in such manner that persons unauthorized by law will be unable to open it without breaking the fastener. One "secures" something by making it safe from the danger of unauthorized entry. This could possibly be accomplished by the nailing, screwing, banding, etc., the ballot box closed, but the impracticability and the absurdity of such methods in regard to the conduct of election laws are obvious. Therefore, under the aforesaid definitions and authorities, the locking of the ballot boxes is the only practical method of complying with the requirements that the ballot boxes should not only be closed but "securely closed," so as to uniformly promote and perpetuate all the purposes and objectives as hereinbefore stated of the aforesaid laws pertaining to the conduct of elections.

In view of the foregoing, it would appear therefore that the terms "securely closed" and "locked" as used in the said election laws are actually interchangeable or synonymous and that ballot boxes in third and fourth class counties should be locked in order to comply with the requirements of Section 111.610, RSMo 1959, that they be "securely closed." This conclusion is further substantiated by Section 111.065, par. 1, subpar. 2, which states in part as follows when specifying the procedure of voting by new residents:

" * * * A ballot box containing the presidential ballots required by this section
shall be kept and locked in the same manner
as is provided by law for the handling of

Honorable Warren E. Hearnes

ballot boxes to be used in elections generally;
* * * (Emphasis supplied).

As to your final question as to who is responsible for locking the ballot boxes, you will note Section 111.490, RSMo 1959, states as follows:

"The sheriffs of their respective counties shall provide, at the expense of their counties, two ballot boxes, one of which shall be numbered 'No. 1' and the other numbered 'No. 2', for each precinct in each municipal township in said counties. The sheriffs shall preserve the same, and have such boxes present at the proper time, for the use of the judges of the elections."
* * * (Emphasis supplied).

You will further note that Section 111.610, supra, indicates that the election judges have the full care, custody, and control of the ballot boxes once they are delivered by the sheriff for the use of the election judges; therefore, the election judges are responsible for locking the ballot boxes when in use pursuant to Section 111.610, supra.

CONCLUSION

Ballot boxes in third and fourth class counties should be locked in order to comply with the requirements of Section 111.610, RSMo 1959, that they be securely closed; and the election judges are responsible for locking the ballot boxes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul A. Slicer, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

PAS:lt

EXTRADITION:
WRITTEN WAIVER:
WHO MAY TAKE:

Sec. 548.260, RSMo 1959, on waiver of criminal extradition, must be signed and consented to in the presence of a judge as provided in said section and does not authorize police officers to take such waivers from the accused.

Opinion No. 182

September 12, 1962

Honorable W. H. Bates
Secretary-Attorney
Board of Police Commissioners
Kansas City 6, Missouri



Dear Mr. Bates:

This office is in receipt of your request for our legal opinion, which reads as follows:

"Section 548.260, Missouri Revised Statutes, 1959, provides that any person arrested in this state and charged with having committed a crime in another state and who is alleged to have escaped from confinement or broken the terms of bail, probation or parole of another state, may waive extradition proceedings by executing in the presence of a judge of a court of record of this state a writing which states that the said person consents to return to the demanding state and further provides that the judge of such court shall inform the person of his rights in extradition or in habeas corpus. In the last half of the second paragraph of the above-mentioned section the following language is noted:

'* * * provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.'

Honorable W. H. Bates

"This Department would like an opinion from your office, stating whether or not officers of this Department, under provisions of the above-quoted part of Section 548.260, Missouri Revised Statutes, 1959, could take a written waiver from an arrestee, showing that he consents to return voluntarily to the demanding state with the officers of the said demanding state, without going through the court of record procedures as are prescribed in the first part of Section 548.260."

The inquiry is in regard to Section 548.260, RSMo 1959, and calls for a construction of the section, particularly that part of subsection 2 of same, which we have underscored. Section 548.260, reads as follows:

"1. Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 548.071 and 548.081 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance or service of a warrant of extradition and to obtain a writ of habeas corpus as provided in section 548.101.

"2. If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of

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such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state." (Underscoring supplied).

In an effort to determine the meaning intended to be given the proviso by the lawmakers, we have examined the general rules of statutory construction, including those dealing with provisos. We find them of little or no aid in this instance of ascertaining the legislative intent.

Our legal research discloses that forty-one of the fifty states of the United States, including Missouri, have adopted those recommended forms of extradition laws known as the "Uniform Criminal Extradition Law."

Although such laws of the various states may not contain identical language in every section, and there may be modifications, additions or absences of certain provisions of lesser importance in some of them, all of said Uniform Criminal Extradition Laws contain the same basic principles and requirements on all important phases of interstate criminal extradition.

We further find that certain sections of the Uniform Criminal Extradition Laws of different states are identical in every respect. Several states have a section identical with Section 548.260, RSMo 1959, but strange as it may seem, we are unable to find a single appellate court decision of any such states (including Missouri) construing a proviso identical to that appearing in Section 548.260, Subsection 2, supra.

Legislative intent is of course the cardinal rule of statutory construction, we therefore turn to the meaning of the language used.

It is clear that Subsection 1 of Section 548.260 spells out a mandatory and exclusive method whereby a person arrested may waive the issuance and service of the warrant of arrest issued by the Governor, i.e., by signing a writing in the

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presence of a judge of a court of record in this state. Subsection 2 continues to the effect that when such consent or waiver has been signed by the accused in the presence of the judge, it shall be sent to the Governor and the judge shall direct that the accused be turned over to the officer of the demanding state, and then commences the proviso clause "provided however that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state."

In order to give this proviso meaning it must necessarily apply to the situation where the accused is not under arrest or not in custody, as, for example, on bond or recognizance. Certainly it is not intended to mean that the right and protection given to the accused to sign the waiver in the presence of the judge is taken away by the proviso clause so as to permit anyone not a judge to take such a waiver and consent.

The meaning of the following clause in the proviso "nor shall this waiver procedure be deemed to be an exclusive procedure" is rather obscure. It either means that the procedure of waiver before the judge may be ignored by the officers and a waiver taken from the accused or it means that the rights and protections of the accused afforded by the statute must be followed in substance but minor irregularities in the procedure would not affect the validity of the waiver procedure.

We believe the latter meaning is intended because the former would tend to emasculate the safeguards set up to protect the accused. Ordinarily statutes should not be construed so as to grant a right, safeguard and protection in one portion of the statute and then by obscure implication remove or abrogate that right by a subsequent proviso clause. This should only be done when the language is clear and unambiguous compelling no other construction.

Finally, the concluding clause of the proviso "or to limit the powers, rights or duties of the officers of the demanding state or of this state," has no reference to the previously outlined procedure for waiver and consent but undoubtedly refers to officers' powers, rights and duties relating to arrest,

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custody, self-defense and the vast multitude of powers, rights or duties possessed by officers. This clause is precautionary and intended to be construed so as not to limit or abrogate any other right, power or duty possessed by officers not related to the procedure spelled out for waiver of extradition.

Moreover, if it was intended by the Legislature to authorize police officers to take waivers from accused persons, the statute should have expressly given such right. Such rights are not ordinarily granted by the Legislature by implication and to grant such a right by implication in a proviso clause is even more rare. The failure to expressly grant such right and power to police officers is deemed to be a lack of such right and power.

It appears therefore that the right and protection granted to the accused in this statute was not intended to be removed by the vague, obscure implication contained in the proviso clause and to grant to police officers at their option the right to take such waivers from the accused.

If the accused person desires to sign a written waiver of issuance and service of the Governor's extradition warrant, thereby consenting to voluntarily and without formality return to the demanding state, then the written waiver procedure provided by Section 548.260, supra, shall be followed. That procedure requires the written waiver to be executed or subscribed in the presence of a judge of any court of record in this state. This requirement is mandatory, and should be strictly followed in order to protect the rights of the accused.

Therefore, in view of the foregoing, it is our opinion that the last proviso of Section 548.260, RSMo 1959, does not authorize officers of the Board of Police Commissioners of Kansas City, Missouri, to take written waivers from accused persons, whereby they waive issuance of the Governor's extradition warrant and all incidental proceedings and consent to return voluntarily and without formality to the demanding state.

CONCLUSION

Therefore, it is the opinion of this office that Section 548.260, RSMo 1959, relating to written waivers of criminal extradition proceedings, must be signed and consented to in the presence

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of a judge of a court of record as provided in said section and does not authorize police officers to take such waivers from the accused.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:al:mv

(Opinion request No. 183 answered by this letter.)

May 2, 1962

FILED
183

Honorable George H. Pace
Representative, Marion County
2023 Kingshighway
Hannibal, Missouri

Dear Mr. Pace:

This will reply to your recent letter requesting an opinion concerning the compensation of magistrate judges in Marion and Cape Girardeau counties. We appreciate the analysis which you have made of the pertinent statutory provisions.

In our opinion, the language of paragraph 3 of subsection 1 of Section 482.150 is plain and unambiguous and cannot be construed to apply to Marion and Cape Girardeau counties.

As your letter points out, paragraph 3 relates to counties having a population of more than 15,000 inhabitants but not more than 30,000 inhabitants, with an assessed valuation of \$26,000,000 or less. The method of determining the assessed valuation is set forth in subsection 3 of Section 482.150. Obviously, neither Marion nor Cape Girardeau County comes within the classification as set forth in paragraph 3. The proviso contained in this paragraph, allowing additional compensation, is specifically limited to "counties in this classification."

The proviso in what is now paragraph 3 of subsection 1 (referring to a court of common pleas with "original, exclusive, criminal and civil jurisdiction") first appeared in Laws of 1951, page 429, as paragraph 5, except that the 1951 law limited the assessed valuation

Hon. George H. Pace

May 2, 1962

to \$24,000,000 instead of the present \$26,000,000. A study of the legislative history of this paragraph makes it evident that the proviso was originally inserted for the purpose of providing for an increase in the compensation of the magistrate of Marion County, inasmuch as the Hannibal Court of Common Pleas was the only common pleas court which had exclusive original criminal and civil jurisdiction. The jurisdiction of the other common pleas courts was concurrent with the circuit court as to civil matters and they did not possess any exclusive original criminal jurisdiction.

Laws of 1955, page 381, increased the maximum assessed valuation applicable to paragraph 3 to \$26,000,000 but left the proviso in question in the same paragraph. Thereafter, although Section 482.150 was twice amended, both in 1959 (H.C.S.H.B. 150) and in 1961 (H.B. 281), the Legislature retained the \$26,000,000 limit on assessed valuation as well as the common pleas proviso in paragraph 3. In these circumstances, we cannot attribute to the Legislature an intent to make the proviso applicable to paragraph 4, even though the proviso, if it is to have any present application at all, would more logically belong in said paragraph 4.

It is the opinion of this office, therefore, that the salary of the Magistrate of Marion County must be determined under the provisions of paragraph 4 of subsection 1 of Section 482.150 and that the salary of the Magistrate of Cape Girardeau County must be determined under the provisions of paragraph 5 of said section.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JH:mc

OPINION NO. 184 ANSWERED BY LETTER.

May 1, 1962



Honorable Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Mr. Hoff:

This is in response to your inquiry as to whether an alderman of a city of the fourth class, having received the largest number of votes from a field of three candidates, may properly take office in spite of the fact that on the day of the election he was delinquent in the payment of taxes to the city. You also state that the back taxes were paid by him on the day after the election and prior to his taking the oath of office.

Section 79.250, RSMo 1959, provides:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office, or who is not a resident of the city."

As you point out in your letter, the determinative issue is whether the disqualification worked by a tax delinquency attaches at the time of the casting of votes or at the time that the candidate is sworn into office.

Honorable Lewis B. Hoff

Although we are aware of the holding in *State ex rel. Thomas v. Williams*, (1889) 99 Mo. 291, 12 SW 905, as to a provision in the St. Louis City Charter which was substantially similar to that under consideration in Section 79.250, we cannot say with any reasonable degree of certainty that such a position would be taken by an appellate court today.

Rather, it is entirely possible that a more liberal view would be adopted such as those appearing in the cases decided in this century on related questions. For example, in *Contley v. Village of Mt. Moriah* (Mo. App. 1932), 49 SW2d 275, a statute requiring the treasurer of a village to give bond before entering upon the duties of his office was held to be directory rather than mandatory. The court said therein, l.c. 276, that "'If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute shall be held to be directory.'"

In *State ex inf. Mitchell v. Heath* (Mo. Sup. 1939), 132 SW2d 1001, our Supreme Court rejected the contention that a school director should be ousted from office because he was not a resident taxpayer who had paid tax within a year prior to his election and because he had not been sworn into office within four days after his election, both of which were statutory prerequisites to election as such officer. The court held that the requirement as to the time within which the oath was to be administered was directory rather than mandatory and gave recognition to the director's swearing in "within a reasonable time and before any effort was made to declare or fill a vacancy."

With regard to the fact that the director had not paid tax within a year prior to the election but had paid before he was sworn into office, the court held that as to property taxes and in view of the system followed in assessing and collecting them, the "reasonable construction" of the statute would be that a person "shall have paid the state and county tax which was due and payable within the calendar year next preceding his election". Significantly, the court then added, l.c. 1005:

Honorable Lewis B. Hoff

"We further hold that a person, who owns taxable property and owes taxes on it which are due and payable during the calendar year preceding his election, would be eligible to take the office of common school director if he pays such taxes at least prior to the time prescribed for taking his oath of office."

The rule of the Heath case evolved after a discussion of the principle recognized by the court that, l.c. 1004, "'statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers.'"

Thus, we have the situation where the strict rule of the 1889 Thomas Case seemingly has been relaxed by some subsequent cases. In last analysis, in light of the decided cases, it would appear that only the Missouri Supreme Court can tell us whether the Thomas case is still of binding effect today.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

AJS:jh

TAXATION:

Macon Country Club property is not within exemption clauses of Sec. 137.100 RSMo 1959 exempting real and personal property from taxation for state, county or local purposes.

May 29, 1962

OPINION NO. 185.

Honorable Charles A. Powell, Jr.
Prosecuting Attorney
Macon County
Macon, Missouri



Dear Mr. Powell:

This opinion is rendered in reply to your inquiry reading, in part, as follows:

"The precise question I have been asked by the County Court of Macon County relative to possible tax exemption of the Macon Country Club, which exemption this club has requested and believes it is entitled to, is not covered on the facts by the aforesaid opinions I now have.

The Macon Club was organized under the old not for profit law in about 1931 and stated purposes being educational and recreational. Until 1959 the grounds used by the club were rented from private owners, but in that year, the present club purchased the ground, and is in the process of paying for it.

The ground is made available at no cost to the school here for use in golf lessons and practice and by the golf team for tournaments, etc. and in connection with school activities, the club house facilities are also available free.

Honorable Charles A. Powell, Jr.

Free lessons are given to the children and interested adults of the town, whether members or not, by various of the members who donate their time in the interest of promoting the game of golf and this club.

Membership dues are charged annually of members (\$50.00 per year up to now).

The grounds are being paid for by share sales in the amount of \$200 to each member, as the members can be sold on the plan and secured, and it is required that a person be the holder of such a share to have a vote in the management of the club.

Can you please let me have the opinion of your office on the possibility of exemption from real property taxation of such not for profit organization as I have described, and oblige."

Any exemption from property taxation claimed by the Macon Country Club must be within the following language from Section 137.100 RSMo 1959:

"The following subjects are exempt from taxation for state, county or local purposes:

* * * * *

(5) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used

Honorable Charles A. Powell, Jr.

or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes". (Underscoring supplied.)

We have underscored the only language found in Section 137.100 RSMo 1959 which can possibly be considered in the light of the factual situation outlined in your inquiry. At the very outset we rule out any contention that the Macon Country Club is tax exempt because its facilities may be made available to schools in carrying out any athletic program, including a golf program, for the reason that under the statute quoted above the property would have to be "actually and regularly used exclusively" for school purposes, and facts presented by you negate any such contention.

In your inquiry you have stated that the Macon Country Club was organized with its stated purposes being "educational and recreational". The facts stated in your inquiry regarding the actual use to which the property of the Macon Country Club is put will not, in our opinion, justify a conclusion that such property is dedicated to "purposes purely charitable" as that language is used in Section 137.100 RSMo 1959. In reviewing the factual situation presented by you it must be reasonably concluded that the uses to which the Macon Country Club is being put do not measure up to a "charity" as stated in the following language from *Salvation Army v. Hoehn*, 354 Mo. 107, 1.e. 114, 188 SW (2d) 826:

"Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting

Honorable Charles A. Powell, Jr.

or maintaining public buildings
or works or otherwise lessening
the burden of government.* * *".

Turning now to the terms "educational" and "recreational" as stated purposes of organization of the Macon Country Club. Such terms are not used in Section 137.100 RSMo 1959, and it is not possible to read them into the statute. The conclusion hereinafter stated is made in view of the following language from *Midwest Bible and Missionary Institute v. Sestric*, 364 Mo. 167, 1.c. 174, 260 SW (2d) 25:

"We are mindful of the settled rule that exemption statutes are strictly but reasonably (so as not to curtail the intended scope of the exemption) construed.' * * * And it is of course true that each tax exemption case is 'peculiarly one which must be decided upon its own facts'. Taxation is the rule. Exemption therefrom is the exception. Claims for exemption are not favored in the law."

CONCLUSION

It is the opinion of this office that under the facts considered in this opinion the property of the Macon Country Club is not within the exemption clauses of Section 137.100 RSMo 1959, exempting real and personal property from taxation for state, county or local purposes.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'N:at

CRIMINAL LAW: The disorderly condition and the drunken
MISDEMEANOR: or intoxicated condition of a defendant
DRUNKENNESS: must both be plead and proven for a
INTOXICATION: prosecution and conviction under Section
DISORDERLY: 562.260, RSMo 1961, Cumulative Supplement.
STATUTES:

OPINION No.186
[1962]

May 24, 1962

Honorable Harold L. Henry
Prosecuting Attorney
Howell County
Post Office Box 592
West Plains, Missouri

186

Dear Mr. Henry:

This is in reply to your opinion request of April 20, 1962, in which you state:

"I would like to request an interpretation of the 'public drunkenness statute', Section 562.260, R.S.Mo., 1961. The part of the statute that I would like to have interpreted is the words, 'in a drunken or intoxicated and disorderly condition', appearing in paragraph two of the statute. The specific question is whether or not a person can be charged and convicted for being in a drunken condition in a public place without also alleging and proving that the party was in a disorderly condition."

Section 562.260, RSMo 1961, Cumulative Supplement (H.B. 155) states:

"1. It shall be unlawful for any person in this state to enter any schoolhouse or church house in which there is an assemblage of people, met for a lawful purpose, or any courthouse, in a drunken or intoxicated and disorderly condition,

Honorable Harold L. Henry

or to drink or offer to drink any intoxicating liquors in the presence of such assembly of people, or in any courthouse within this state and any person or persons so doing shall be guilty of a misdemeanor. (underlining supplied)

"2. It shall be unlawful for any person in this state to attend or be in any other public place, in a drunken or intoxicated and disorderly condition, and any person or persons so doing shall be guilty of a misdemeanor. As used in this section, the term 'public place' includes but is not limited to any common carrier, building, street, lane, park, or place of public resort, recreation or amusement other than a privately owned and operated business establishment." (underlining supplied)

Said section employs the phrase "in a drunken or intoxicated and disorderly condition."

However, Section 562.260, RSMo 1959, which was repealed by Section 562.260, RSMo 1961, Cumulative Supplement, merely used the phrase "in a drunken or intoxicated condition."

In discussing the use of the words "or" and "and" in the law, the following statement is found in 3 C.J.S., page 1068:

"Ordinarily the words 'and' and 'or', are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive, the latter of a disjunctive nature. Never-

Honorable Harold L. Henry

theless, in order to effectuate the intention of the parties to an instrument, a testator, or a legislature, as the case may be, the word 'and' is sometimes construed to mean 'or'. This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion;
- - - -"

Due to the foregoing language, it becomes necessary to ascertain if the Legislature's intention was to use the word "and" in its conjunctive rather than disjunctive sense.

If used in the conjunctive in Section 562.260, RSMo 1961, Cumulative Supplement, the Legislature, in effect, added an additional element to this particular misdemeanor, thus necessitating the pleading and proving not only of intoxication or drunkenness, but in addition the element of disorderly condition in order to convict one under this particular section.

The original and perfected House Bill No. 155 of the 71st General Assembly contained only the phrase "in a drunken or intoxicated condition."

However, the Senate Committee Substitute for House Bill No. 155, which was passed, added the words "and disorderly" to the above phrase.

It is, therefore, clear that the Legislature by specifically adding the phrase "and disorderly condition" to the phrase "in a drunken or intoxicated condition" as it had appeared in Section 562.260, RSMo 1959, prior to its repeal, did not intend "disorderly condition" to be synonymous with "drunken or intoxicated condition," but consciously and intentionally added the additional element of "disorderly condition" to this particular misdemeanor, and indicated such by using the word "and" in the conjunctive sense.

Honorable Harold L. Henry

CONCLUSION

Pursuant to the language employed in Section 562.260, RSMo 1961, Cumulative Supplement, it is necessary to plead and prove not only that defendant was "in a drunken or intoxicated" condition, but he was also in a "disorderly" condition in order to obtain a misdemeanor conviction under said section.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

June 7, 1962

Honorable Stephen E. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Mr. Strom:

We have your opinion request of April 23, 1962 which reads as follows:

"A charge of leaving the scene of an accident is pending in Cape Girardeau County arising out of a situation where the defendant lost control of his automobile while rounding a curve, skidded into a filling station driveway, there struck a truck, and departed without leaving his name and address.

"I request your opinion concerning whether Section 564.450 RSMo 1959 applies where the damage and accident occur off the public highways.

"I find no Missouri authorities on the above question, but there are a number of cases cited in 77 A.L.R.2d 1167 wherein courts have held that other similar charges in other states have been held not to apply to the above described situation."

As you are aware, our office does not render official opinions on matters which are the subject of pending litigation. This long-standing policy evolved years ago when, so it seems, the Attorney General was opinionating on various matters at the same time when various judges were about to rule on the same questions and said judges felt that they were being unduly pressured by reason of such opinions.

With the foregoing in mind, we make the following general observations which are not in the nature of an official opinion.

Honorable Stephen E. Strom - 2.

June 7, 1962

I am inclined to believe that, under the facts stated in your opinion request, a case could be made under the "hit-and-run" statute, Section 564.450. That statute is applicable only to a person "operating or driving a vehicle on the highway," but it is not specific with respect to the point where the injury to person or damage to property must occur. It is my thought that where the injury to person or damage to property arises out of and results from the operation of a vehicle on a highway, the statute is applicable, and that it is immaterial that, because the vehicle has skidded or accidentally run off the highway, the point of impact is off the highway. To me, there could be no doubt as to the answer if the vehicle was still partly on the highway when impact occurred; and I would reach the same answer even though the vehicle was wholly past the right-of-way line.

I have been unable to find any case which I consider in point. In *State v. Smith*, 189 P.2d 205 (Arizona), the statute required a collision upon the highways and there was no allegation in the information that the collision was in anywise related to use of highways. Even under my view, such an information would likewise be insufficient under Missouri law. The other cases discussed in the annotation in 77 ALR 2d 1171 also, in my view, are not in point because they involve accidents which did not occur (or it was not alleged and proved that they occurred) in connection with the use of the highways.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TFE:oh

April 26, 1962

FILED
189

Mr. V. H. Simon, Chairman
Wilson's Creek Battlefield National
Park Commission
c/o The Southern Missouri Trust Company
Springfield, Missouri

Dear Mr. Simon:

This refers to your letter of April 23, 1962, relating to the acquisition and conveyance of real estate by your commission under the provisions of Senate Bill No. 254, 71st General Assembly.

As noted in your letter, Section 4 of Senate Bill No. 254 provides in part that the Wilson's creek battlefield national park commission shall have the following powers and duties:

"(1) To acquire and convey to the United States of America or any of its agencies such lands and improvements thereon and any monuments as may be designated by the United States of America or any of its agencies for inclusion in the Wilson's creek battlefield National park pursuant to Public Law 86-434 of the 86th congress of the United States, which established the park; "

Another provision of Section 4 authorizes the commission to exercise the right of eminent domain in the acquisition of real estate. Section 7 of the bill contains a reference to the acquisition and conveyance of real estate by providing for a final report and dissolution of the commission when the commission "has acquired and conveyed to the United States all lands and improvements designated by the secretary of the interior or the national park service for inclusion in the Wilson's

creek battlefield national park."

It is our opinion that title to the real estate acquired by your commission should be taken in the name of the State of Missouri, rather than in the name of your commission. In order to identify the real estate as real estate acquired by your commission and subject to control and conveyance by it, it is our recommendation that the deeds show the real estate to be conveyed to "State of Missouri, for the use and benefit of Wilson's Creek Battlefield National Park Commission." This is in accordance with a practice which has been commonly followed in the acquisition of real estate by state agencies.

It is our opinion, further, that the above quoted statutory provision clearly authorizes your commission to convey to the United States of America, or agencies thereof, the real estate which it acquires. It is our recommendation that the deeds show the real estate to be conveyed by "Wilson's Creek Battlefield National Park Commission, acting for and on behalf of the State of Missouri. "

With respect to who signs and acknowledges such deeds on behalf of your commission, it is our opinion that, under authorization by appropriate resolutions of your commission, this may be done by the chairman or the chairman and secretary of your commission, or that the deeds may be signed and acknowledged on behalf of the commission by all members of the commission. While we do not consider it essential, it has been a rather common practice in comparable situations for deeds to be signed and acknowledged by all members of boards or commissions conveying state owned land, and this perhaps has the advantage of reducing the chance that the authority of the persons executing the deeds may be questioned at some future time.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

May 23, 1962



Honorable E. J. Cantrell
State Representative
3rd District, St. Louis County
3406 Airway
Overland 14, Missouri

Dear Mr. Cantrell:

Subsequent to our letter to you of April 25, 1962, regarding permissible sources of fire protection district ordinances, we were contacted by Mr. T. Douglas Moore, an attorney representing the Community Fire Protection District of St. Louis County. Mr. Moore advised that he initially addressed the questions to you which gave rise to your request for advice, and stated further that he was calling upon us with your consent to amplify the questions put by your letter.

As we understand the request now, it contains three questions which may be stated thusly:

1. May a fire protection district adopt a code which is denominated as a "building" code, where its provisions govern matters directly related to fire security and prevention.
2. If a fire protection district desires to adopt a code, such as the BOCA Basic Building Code, may it do so by simply enacting an ordinance which refers to that code by name alone; or is it necessary to set the entire code out at length and act upon it directly.

3. May a fire protection district adopt a building code, such as the BOCA Basic Building Code, as it exists at the time of adoption and provide for the automatic incorporation in future of any amendments or additions thereto by the agencies which compile and publish such code.

As pointed out in our first letter, fire protection districts are empowered to enact ordinances which are "necessary for the carrying on of the business, objects and affairs of the board and the district" Section 321.210 (12), RSMo 1959. If the provisions of the proposed code bear a reasonable relationship to the ends provided in the statute, the code may be adopted regardless of the fact that it is named and known as a "building" code. Each section of the code would, of course, have to qualify on its own merits, but the fact that the code is denominated as a "building" code would not ipso facto disqualify it as a source of ordinances to be enacted by a fire protection district. The answer to the first question is, therefore, in the affirmative.

Neither the statutes nor the Missouri cases relating to fire protection districts give us any assistance in the resolution of the second question as to whether the code need be set out at length if it is to be adopted. Our examination of the copy of the 356 page BOCA Basic Building Code which was furnished to us by Mr. Moore reveals that it is a product of the Building Officials Conference of America, a private organization composed of civic minded members of the building industry. The code, though apparently well known to those in the industry, is not a matter of public record.

In *Thompson v. Scenic Ry. Co. v. McCabe*, (Mich. Sup. 1920) 178 NW 662, the City of Detroit had adopted a lengthy building code by reference to it in an enacting ordinance. When the Commissioner of Buildings refused to issue a building permit to allow the construction of a roller coaster because it violated one of the provisions of the code, the efficacy of the method of adopting the code by reference was challenged in the courts.

The city charter required publication at length of all ordinances, however, the defendants countered that such publication would have cost upwards of \$8000 and defended on the theory that an ordinance may properly incorporate by reference existing laws, ordinances, and public records. The defense contended that the filing of a copy of the code with the city clerk made the code a public record.

The Michigan court rejected all these contentions and, while agreeing that public records may be incorporated by reference, held that the code could not be so regarded as it was a "fugitive paper" which happened to be in the possession of the clerk. The court concluded that mandamus should issue to compel the granting of the permit.

In *City of Hazard v. Collins* (Ky. 1947) 200 SW2d 933, the court summed up the primary issue thusly, l.c. 933-934:

"The question presented on this appeal is whether or not the City of Hazard, a fourth class city with a commission form of government, could adopt a building code (hereinafter referred to as the Code) of 300 pages merely by referring to such Code in an ordinance duly passed, recorded and published. The chancellor held that such reference did not make the Code a part of the law of the city, and it appeals."

The affirmance of the decision of the trial court was based largely upon Kentucky statutes relating to cities of the fourth class which generally required publication and reading at length. The court rejected the contention that the code was made a matter of public record by the mere filing of copies with the city clerk, but suggested an alternative method, l.c. 935:

"We do not hold that a fourth class city cannot adopt a building code or a health or a safety regulation as a part of its law by reference in a duly passed ordinance without publishing and spreading such code or regulation on the ordinance book, as is required by statutes. But we do say that before such a document may be adopted by reference in an ordinance

that the document must first be read and approved by the law making body of the city in a formal session by a resolution duly passed and recorded showing that such action has been taken. If this is done and the document thus made a part of the public records of the city, we see no reason why it cannot be enacted into law by reference in a duly passed and published ordinance without spreading the document itself on the ordinance book as required by KRS 89.540 or by publishing it in conformity with KRS 86.090."

Although the Thompson and City of Hazard cases were each grounded on some statutory basis, we think they are helpful in determining judicial attitude toward the incorporation of codes by reference. As mentioned above, we are not assisted in the instant case by any statute setting out the formalities to be followed by a fire protection district in enacting ordinances; and the only case our research has uncovered which presents an analogous situation is State v. Waller, (Ohio App., 1943) 69 NE 2d 438.

In that case, defendant had been found guilty of a violation of a regulation of a county board of health requiring anyone selling milk to have a permit to do so. The regulation had been enacted by reference thereto, the source being forms published by the United States Public Health Service. Although no specific provisions were made by Ohio law for the method of adopting regulations by a board of health, the court said, l.c. 439:

"From a reading of section 1261-42, General Code, it is apparent that the rules and regulations of a duly constituted District Board of Health, such as that of Butler County, were, by the legislature, considered to be in the nature of City ordinances, and their adoption and promulgation intended by the legislature to be accomplished in similar manner and form, including publication as set forth in that section, and surrounded with similar procedural safeguards. It would

therefore, seem that their publication should be substantially as required for city ordinances and the right to adopt them in abbreviated form incorporating material therein by reference governed accordingly."

The court then held that cities could incorporate into their law by reference only matters officially adopted of public record, and all other matters were required to be set out in full as required by statute. The regulation was therefore ruled invalid.

We believe this is a reasonable view and would be adopted by a Missouri court, if confronted with the instant problem. In this connection, we note the existence of statutory provisions relating to Missouri cities of the third and fourth class which require that all ordinances be passed by bill, that they be read three times prior to passage, that no ordinance be revived or reenacted by mere reference to the title thereof but be "set forth at length, as if it were an original ordinance." Sections 77.080 and 79.130, RSMo 1959.

We express no opinion as to whether all of the formalities required for the passage of ordinances by cities of the third and fourth class are applicable to the adoption of ordinances by fire protection districts. However, we are of the opinion that a fire protection district may not incorporate into its law a model code which is not a subject of public record by simply referring to that code by name in an enacting ordinance.

In further support of this position we cite the following texts: McQuillin, Municipal Corporations, Vol. 5, Section 16.12, pp. 180-181, wherein we find:

"In recent years there has been some tendency to adopt by reference nationally or regionally recommended or standard ordinances, such as building codes or milk ordinances. Generally speaking, incorporation by reference of such a standard or code, without more, cannot constitute the effective and valid enactment of an ordinance. Nor does it

suffice for enactment of such an ordinance or code merely to leave copies of it in the clerk's office and then refer to it in an ordinance duly passed. * * *

In Charles S. Rhyne's Municipal Law, Section 9-6, pp. 232-233, appears the following:

"Many states have authorized municipalities to incorporate by reference the provisions of certain technical codes and statutes, thus dispensing with the requirement of publication. The courts have generally sustained ordinances adopting by reference the provisions of statutes, prior ordinances or other codes or regulations which were found to be matters of public record. However, attempts to adopt by reference amendments in future to such provisions or regulations not officially matters of public record have been held invalid."

The foregoing quote from Mr. Rhyne's treatise touches on the final question, i.e. whether future amendments of any code adopted can be provided for so as to make them a part of the existing law as soon as the amendment is accomplished and with no further action on the part of the fire protection district. For example, under the terms of such a provision, any changes in the BOCA Code effected by the next conference of its members would "automatically" become an ordinance of the Community Fire Protection District or amend any existing ordinance of that agency.

We believe that a negative answer to this question requires no citation of authority. The plan proposed amounts not only to a delegation of ordinance making power but, indeed, to the virtual abdication of it. The legislature has granted the duty as well as the power to operate fire protection districts to the board of directors of each district. Such duty may

Honorable E. J. Cantrell

-7-

not be avoided by passing it on to a private organization, regardless of the high motives and professional qualifications of the members of that organization.

We sincerely hope that the foregoing will be of assistance to you.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:ms

CONSTITUTIONAL LAW:
SPECIAL CHARTER TOWN:
VILLAGE:
MAY BECOME CONSTITUTIONAL
CHARTER TOWN AND CONSTITUTIONAL
CHARTER VILLAGE WHEN:

July 13, 1962

Meaning of "city" in Section 19, Article VI, Constitution of Missouri includes town and village. A Special Charter town incorporated prior to 1875 Missouri Constitution, with more than 10,000 population may become constitutional charter town by following procedure of said Section 19, Article VI, Constitution of Missouri. A village having more than 10,000 population may become constitutional charter village by following procedure of above mentioned constitutional provision.

Opinion No. 193

Honorable Patrick J. Hickey
Missouri House of Representatives
2nd District St. Louis County
4508 St. Leo Lane
St. Ann, Missouri



Dear Mr. Hickey:

This office is in receipt of your request for a legal opinion which reads as follows:

"May a Special Charter Town, incorporated prior to the Constitution of 1875 and having a population in excess of 10,000 frame and adopt a charter as provided in Section 19 of Article VI of the Constitution of 1945 even though said section provides only that a City may frame and adopt such a charter?"

"May a Village frame and adopt such a Charter?"

Section 81.010, RSMo 1959, provides that all cities and towns of this state operating under charters granted directly and specifically by the general assembly prior to the adoption of the Constitution of 1875 are defined as cities and towns under special charter. We understand the present inquiry to be whether a special charter town (as defined by said Section 81.010), having a population in excess of 10,000, may frame and adopt a charter for its government as provided by Section 19, Article VI, of the Constitution of Missouri, where said section provides that only a "city" may frame and adopt such a charter.

Section 19, Article VI, of the Constitution of Missouri, provides in part as follows:

Honorable Patrick J. Hickey

"Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state, in the following manner, * * *"

Although there are cases construing this section of the Constitution, we have found none which construe the word "city" as used in this provision.

We are not unmindful of the case of State ex rel. v. Lichte, 226 Mo. 273, 290, 291, 126 SW 273, which construed Article IX, Section 7 of the Constitution of 1875 (now section 15, Article VI, Const. 1945). While this case holds that the word "town" has a comprehensive meaning and includes the words "city" and "village", yet this case does not help us in a determination of whether or not the use of the word "city" in Section 19, Article VI, Constitution of Missouri, 1945, includes towns and villages.

This office, in an opinion to Honorable C. W. Detjen, Assistant County Counselor, St. Louis County, on April 21, 1953, construed Section 18c, Article VI of the Constitution of Missouri, relating to county charters, and concluded that the term "incorporated cities" as used in that section includes towns and villages and applies to all incorporated cities, towns and villages as defined by the Laws of Missouri. A copy of that opinion is herewith enclosed.

There is no indication that the framers of the Constitution of Missouri in the writing of Section 19, Article VI, intended to use the word "city" in any technical sense or to give it a special or unusual meaning. It was intended rather to refer to any municipality "having more than 10,000 inhabitants". It appears clear that the intent was that those communities that attained a minimum of 10,000 population would have problems peculiar to communities of that size and that therefore such communities should be authorized to frame a charter for their own self-government.

In the case of People vs. Northfield Township School District, 84 NE 2d 553, 402 Ill. 435, the Supreme Court of Illinois held that the object and purpose of legislation can be examined to determine the meaning of the terms used. The Court held that a statute providing that, when any city of 1,000 to 100,000

Honorable Patrick J. Hickey

population lies within two or more townships, that township in which a majority of the inhabitants of the city reside shall, with the city, constitute a school township, included towns and villages because the intent was to prevent the dissection of communities by township lines with resulting inconvenience and destruction of community interest in schools.

Likewise, in construing this provision of the Constitution, the purpose and object of the provision may properly be considered in construing the meaning thereof. The purpose of the constitutional provision was to authorize municipal communities with more than 10,000 inhabitants to frame and adopt a charter for its self government. Therefore, the word "city" is intended to include all municipalities whether they be designated "towns", "villages" or "cities" by the statutes.

It is further our opinion that the use of the word "city" in Section 19, Article VI of the Constitution of 1945, includes towns and villages as well as cities, as defined in the statutes, when the other conditions of the provision are met.

CONCLUSION

It is the opinion of this office that the meaning of the word "city" appearing in Section 19, Article VI of the Constitution of Missouri includes towns and villages.

A special charter town incorporated prior to the adoption of the Missouri Constitution of 1875 and having a population of more than 10,000 may frame and adopt a charter for its own government by following the procedure specified by Section 19, Article VI of the Constitution. Likewise, it is our opinion that a village having a population of more than 10,000 may frame and adopt a charter for its own government by following the procedure authorized by Section 19, Article VI.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PNC:lt

(JGS)

Enc.

INSURANCE: Amended Articles of Incorporation of National Security Life Insurance Company.

June 12, 1962



Honorable Jack L. Clay
Superintendent of the
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

This opinion is rendered in reply to your letter of April 25, 1962 which was accompanied by a Certificate of Amendment of the Articles of Incorporation of National Security Life Insurance Company. On May 7, 1962 you supplemented the Certificate of Amendment by furnishing an executed copy of amended Articles of Incorporation of the named stipulated premium life insurance company, such documents disclosing proceedings of the directors and stockholders of National Security Life Insurance Company taken under Section 377.450 RSMo 1959 to accept the provisions of Missouri's regular life law found at Sections 376.010 to 376.670 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 377.450 RSMo 1959. It is the opinion of this office that said documents are legally sufficient as to form, are in accord with the provisions of Sections 376.010 to 376.670 RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLD'eat

JUSTICE OF THE PEACE: 1. Resignation from the office of justice of the
MAGISTRATES: peace served to create a vacancy in the office.
OFFICERS: 2. A person not a lawyer who had neither served
VACATING OFFICE: as a justice of the peace for four years prior to
nor had been serving as a justice of the peace on
the adoption of the 1945 Constitution, cannot
qualify to serve in the office of magistrate.

June 22, 1962

Opinion Request No. 196
(McFadden)

Honorable Frederick E. Steck
Prosecuting Attorney
Scott County
Sikeston, Missouri



Dear Mr. Steck:

This is in response to your recent request to this office for an opinion which, so as to avoid misunderstanding, I will paraphrase as follows:

A man, not a lawyer, who served as a justice of the peace from May 1942 until May 1944, at which time he resigned and was inducted into the United States Army, has now filed as a candidate for magistrate of your county.

The questions presented are: Did resignation from the office of justice of the peace for the purpose of entering the United States Army create a vacancy in the office? Can one who resigned for that purpose before 1945 who had not prior thereto served four years as a justice of the peace, now qualify to serve as a magistrate?

The Constitution of Missouri, 1945, Article V, Section 25 provides in part:

" . . . Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."

The Constitution containing the foregoing provisions was adopted in 1945.

Honorable Frederick E. Steck

The question as to vacating the office disappears when viewed in the light of *Mansur vs. Morris*, 196 SW 2d 287, 1. c. 290, where one who had resigned his office of justice of the peace for the purpose of entering the Armed Forces was treated as having created a vacancy, whereas on the other hand one who had been inducted into or joined the Armed Forces without resigning was treated as not having created a vacancy in the office.

Thus under the facts presented the person in question vacated his office in May 1944 by resignation and therefore cannot be said to have been serving as a justice of the peace when the new Constitution was put into effect.

Furthermore, since the person in question served as a justice of the peace only from May 1942 to May 1944, which is two years, he could not qualify upon the ground that he had served four years as a justice of the peace prior to the inception of the 1945 Constitution.

Clearly the individual treated here, who is not a lawyer, could not qualify to serve as a magistrate if elected to that office.

CONCLUSION

1. Resignation from the office of justice of the peace served to create a vacancy in the office.
2. A person not a lawyer who had neither served as a justice of the peace for four years prior to, nor had been serving as a justice of the peace on the adoption of the 1945 Constitution, cannot qualify to serve in the office of magistrate.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Howard L. McFadden.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

HLM:MW

May 1, 1962

FILED
198

Honorable Charles B. James
Member
House of Representatives
Clarkton, Missouri

Dear Mr. James:

This is in answer to your recent letter in which you inquired concerning House Joint Resolution No. 27 and House Joint Resolution No. 9 of the 71st General Assembly, both of which resolutions submitted amendments of Section 11(c) of Article X of the Constitution, which will be voted on at the coming November election.

The only change in Section 11(c) of Article X of the Constitution that will be made if House Joint Resolution No. 9 is passed is to provide, when authorized by law, for the imposition of a tax above the constitutional limit for airport purposes and, in counties of the third and fourth classes, for university extension division.

The change that will be made in Section 11(c) of Article X if House Joint Resolution No. 27 is adopted is to provide that in school districts of over 700,000 the rate of taxation, as limited by the Constitution may be increased for school purposes so the total levy shall not exceed three times the constitutional limit for not to exceed four years, by a vote of four-sevenths.

It appears, therefore, that the two joint resolutions do not attempt to amend the same provisions in Section 11(c) of Article X.

Resolution No. 9 simply adds two categories which, when authorized by law, may have additional taxes provided for above the constitutional limit, and Resolution No. 27 does not amend this provision of Section 11(c) of Article X. Resolution No. 27 changes the

majority required for increasing the tax rate in school districts of over 700,000 by providing for a four-sevenths vote for such purposes when the levy shall not exceed three times the constitutional limit, for not to exceed four years. House Joint Resolution No. 9 does not contain any provision relating to school districts over 700,000 as such. Therefore, it appears that all the provisions of these joint resolutions can be given effect if both are passed. That is, if both resolutions are adopted as amendments, the provision in Resolution No. 27 will become effective insofar as school districts in cities of over 700,000 is concerned, and Resolution No. 9 will become effective in authorizing the legislature to provide for an additional tax above the constitutional limits for airport purposes and for university extension divisions in counties of the third and fourth classes. The other provisions of both resolutions are the same as the present Section 11(c) of Article X and will also, of course, be effective.

The rule enunciated by the courts in such matters is that the amendments adopted at the same time should be construed so that effect may be given to both if possible. It is stated in 11 Am.Jur., Section 54, page 664 as follows:

"It is the rule, of course, that when two amendments are adopted on the same day, they should, if possible, be so construed that effect may be given to both."

It is, therefore, our view that if both Joint Resolution No. 27 and Joint Resolution No. 9 are adopted at the November election that the provisions of both such amendments will be in effect.

Respectfully submitted,

THOMAS F. EAGLETON
Attorney General

HOURS OF FEMALE EMPLOYMENT:
FEMALE EMPLOYEES:
WORKING HOURS:

The provisions of Section 290.040, RSMo 1959, stating that no female employed by certain named industries shall work more than 9 hours during any one day, or more than 54 hours during any one week, may not be waived by an individual female employee covered thereunder.

NOTE: This opinion when sent out should always be accompanied by Op. No. 231-1971.

Opinion No. 199 (1962)

August 10, 1962

Honorable Don L. Cummings, Director
Division of Industrial Inspection
State Office Building
Jefferson City, Missouri



Dear Mr. Cummings:

This is in response to your letter of May 1, 1962, requesting an opinion of this office regarding a waiver by a female employee of the provisions of Section 290.040, RSMo 1959, setting forth the maximum number of hours a female shall work in certain named industries.

In the letter attached to your request there was no question raised either as to the constitutionality of the statute or its applicability to the industry represented by the writer. The sole question was whether, at the request of her employer, a female employee covered by the statute could waive the provisions thereof and on certain occasions work "one-half to one hour in excess of the statutory maximum a few times a month, the occasion for such excess work being regulated by receipt of a rush order or for taking inventory, etc." This opinion therefore shall be confined to this question only.

The pertinent portion of Section 290.040, RSMo 1959, reads as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical,
* * * more than nine hours during any one day, or more than fifty-four hours during any one week; * * *"

Section 290.050, RSMo 1959, provides a penalty for any violation of this statute.

Honorable Don L. Cummings

In *Holden vs. Hardy*, (1898) 169 U.S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, it was held to be within the police power of a state to pass a statute limiting the employment of working men in all underground mines or workings to eight hours per day on the grounds such a limitation was necessary for the preservation of the health of the employees. A similar Missouri statute was upheld in *State vs. Cantwell*, (1904) 179 Mo. 245, 78 S.W. 569 (affirmed in 1905, 199 U.S. 602, 26 Sup. Ct. 749, 50 L. Ed. 329). In *Muller vs. Oregon*, (1908) 208 U.S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, the court upheld a statute limiting the hours of labor of women employed in laundries to ten hours daily on the grounds that "the physical well-being of woman becomes a subject of public interest and care in order to preserve the strength and vigor of the race. * * *" This was extended to other forms of employment for women in *Hawley vs. Walker*, (1913) 232 U.S. 718, 34 Sup. Ct. 479, 58 L. Ed. 813, and *Radice vs. New York*, (1924) 264 U.S. 292, 44 Sup. Ct. 325, 68 L. Ed. 690. In each of these cases, the statute in question was upheld as a valid exercise of the police power of a state to protect the public health and welfare of its citizens.

The question of a waiver by an employee of the provisions of Section 290.040 or similar statutes has not been decided by the courts of Missouri. However, the courts of other states unanimously have held the provisions of similar statutes cannot be waived by the employees covered thereunder. *Short vs. Bullion-Beck & Champion Min. Co.*, (1899) Utah, 57 P. 720; *State vs. Livingston Concrete Bldg. & Mfg. Co.*, (1906) Mont., 87 P. 980; *Montgomery Ward & Co. vs. Lusk*, (1932) Texas, 52 S.W. 2d 1110; and *Lewis vs. Ferrari*, (1939) Calif., 90 P. 2d 384. In each of these cases the court emphasized the statute in question was passed in exercise of the police power of the state for the benefit of all its citizens and for the good of the public as a whole. This protection to the public may not be waived by a single individual even though he or she may be directly benefited by the law.

A very good analysis of the question was made by the court in *Lewis vs. Ferrari*, supra. Plaintiff, a woman, sued her employer for overtime wages. Both had agreed that plaintiff work overtime but show only forty-eight hours per week, the limit allowed by statute which in its pertinent points is exactly like Section 290.040. The court held the woman could not recover for working the time in excess of the statutory limitation as both parties violated the statute the provisions of which could not be waived. On page 387 the court held:

"But generally speaking where police regulations are made undertaking to

protect some particular class of persons, such protection is awarded because the welfare of such class of persons is conceived to be bound up with the welfare of the community as a whole. Particularly is this the case with women as a class. The circumstance that the restricting of their hours of labor inures to their benefit does not militate against its beneficial effect through them on the health and welfare of the community as a whole. When, therefore, a particular woman, participates in the violation of such a regulation, it seems to us fallacious to argue that she is justified in so doing because the regulation is meant for her benefit and she has a right to waive the benefit. We hold that she has no such right. The benefit is one intended for the community of which she is but a single member, and the circumstance that she may be one of the members of the community especially benefited by the regulation affords her no justification for violating it."

The same reasons given by other courts for refusing to allow an employee to waive the statutory limitation on the maximum number of hours he or she may work apply equally to Section 290.040.

This concept is furthered by the wording of the statute itself. Section 290.040 sets a maximum number of hours a female employed in the industries named therein may work. No exceptions were made. In this respect this statute is similar to the other Missouri statutes limiting the working hours of employees; Sections 290.020 (mining and metalurgy), 290.060 (females before and after childbirth), 294.030 (children), and 444.280 (miners). In none of these statutes was any provision made under which the employee covered could waive this limitation. These statutes may be contrasted with Section 290.010, RSMo 1959, wherein the legislature, after prescribing the period of eight hours a legal day's work, went on to add: "but nothing in this section shall be so construed as to prevent parties to any contract for work, services or labor from agreeing upon a longer or shorter time." It is our opinion if the legislature intended a similar exception in Section 290.040, it would have so provided.

Honorable Don L. Cummings

The contention that an employee should be free to determine his or her own working hours over a prescribed minimum was answered fully by the court in State vs. Livingston Concrete Bldg. & Mfg. Co., supra, on page 982 wherein it stated:

"If it was the legislative will that no exception be made to the rule announced, the courts cannot say that a different policy should have been pursued."

If a female or other employee benefited by the laws of the State of Missouri limiting their hours of employment could individually waive the provisions of these laws, their situation could easily become no different than before the enactment of these laws and the evil they sought to correct would still exist.

CONCLUSION

Therefore, it is the opinion of this office that the provisions of Section 290.040, RSMo 1959, limiting the work of a female in certain specified industries cannot be waived by a female employee covered thereunder.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JD:BJ

PROSECUTING ATTORNEYS:

ENFORCEMENT OF

SUPPORT LAW:

Under Missouri Uniform Reciprocal/ of Enforcement
Support Law, Chapter 454, RSMo 1959,
prosecuting attorney has mandatory duty
to seek appropriate orders of execution
and garnishment when a cause has been
forwarded to and docketed in Missouri.

OPINION NO. 200

September 10, 1962

Honorable Fred Steck
Prosecuting Attorney
Scott County
Benton, Missouri



Dear Mr. Steck:

This opinion is rendered in reply to your inquiry
reading, in part, as follows:

"Does the Prosecuting Attorney have the duty to take the necessary steps to try to collect a judgment under the Uniform Reciprocal Support Act? To be more specific, a suit is filed by an ex-wife against the father for the support of his children in the State of Utah and in due course a suit is filed in Missouri against the father under the Uniform Reciprocal Enforcement of Support Act and a judgment obtained for child support. Thereafter, the father fails to make payments according to the Missouri judgment to his former wife in the State of Utah for the support of the children.

"Now, does the Prosecuting Attorney have a duty to have an execution issued to levy on the father's property and/or to have the father's wages garnished in an attempt to collect the judgment."

Missouri's Uniform Reciprocal Enforcement of Support Law is found at Sections 454.010 to 454.360, RSMo 1959.

Section 454.120 RSMo 1959 provides:

"The prosecuting attorney upon the request of the court or of the state

Honorable Fred Steck

division of welfare shall represent the plaintiff in any proceeding under sections 454.010 to 454.360."

Section 454.180 RSMo 1959 provides:

"1. After the court of this state has received from the court of the initiating state the aforesaid copies the clerk of the court shall docket the cause and notify the prosecuting attorney of his action.

"2. It shall be the duty of the prosecuting attorney to diligently prosecute the case. He shall take all action necessary in accordance with the laws of this state to give the court jurisdiction of the defendant or his property and shall request the court to set a time and place for a hearing."

Section 454.190 RSMo 1959 provides:

"1. The prosecuting attorney shall, on his own initiative, use all means at his disposal to trace the defendant or his property and if, due to inaccuracies of the petition or otherwise, the court cannot obtain jurisdiction, the prosecuting attorney shall inform the court of what he has done and request the court to continue the case pending receipt of more accurate information or an amended petition from the court in the initiating state.

"2. If the defendant or his property is not found in the county and the prosecuting attorney discovers by any means that the defendant or his property may be found in another county of this state or in another state he shall so inform the court and thereupon the clerk of the court shall forward the documents received from the court in the initiating state to a court in the

Honorable Fred Steck

other county or to a court in the other state or to the information agency or other proper official of the other state with a request that it forward the documents to the proper court. Thereupon both the court of the other county and any court of this state receiving the documents and the prosecuting attorney shall have the same powers and duties under sections 454.010 to 454.360 as if the documents had been originally addressed to them. When the clerk of a court of this state transmits documents to another court, he shall notify forthwith the court from which the documents came.

"3. If the prosecuting attorney has no information as to the whereabouts of the obligor or his property he shall so inform the initiating court."

Section 454.220 RSMo 1959 provides:

"If the court of the responding state finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order."

In reading the foregoing quoted sections as well as the other parts of the law, it appears that there are two basic types of proceedings envisioned in said law.

First, there is the situation where the proceeding is initiated in Missouri and ultimately forwarded to the asylum state where the father is located. It is the positive duty of a prosecuting attorney to initiate such a proceeding "upon the request of the court or of the state division of welfare." See Section 454.120, RSMo 1959. Naturally, it goes without saying that on good cause shown the prosecuting attorney can, in his discretion, initiate a proceeding on his own without waiting to be so ordered by the court or the division of welfare.

Honorable Fred Steck

Second, there is the situation where the proceeding is initiated in a state other than Missouri and forwarded to Missouri as the asylum state of the father. As we read Sections 454.180 and 454.190, RSMo 1959, once the case is docketed, it is the duty of the prosecuting attorney to do everything within his power to carry out the provisions of the Uniform Reciprocal Enforcement of Support Law. The duty placed upon the prosecuting attorney under the statutes quoted above to search out and trace the property of a defendant is so worded as to lead to the conclusion that he should seek appropriate orders of execution and garnishment where it is necessary to carry out an order of support issued by the Missouri court.

CONCLUSION

It is the opinion of this office that under Missouri's Uniform Reciprocal Enforcement of Support Law (Chapter 454), a prosecuting attorney has a mandatory duty to seek appropriate orders of execution and garnishment when a cause has been forwarded to and docketed in Missouri and where such is necessary in order to implement an order of support issued by the Missouri court entertaining the cause.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO:M:ms; TFE:ml

ANSWERED BY LETTER 5/2/62

204

May 2, 1962

Hon. Charles A. Powell, Jr.
Prosecuting Attorney
Macon, Missouri

Dear Mr. Powell:

I have your letter of April 27, 1962 concerning Mr. Britt,
etc.

First off, let me state that I have not rendered any
opinion, by phone or otherwise, to Mr. Collins. He simply called
me and asked if we had any opinions on file analogous to the problem
of Mr. Britt. I had our files checked and the closest thing we
could find was the opinion of July 7, 1961 to Rolin Boulware which
dealt with Chapter 475. As you point out, we also have on file an
opinion dated July 23, 1959 to Patrick Freeman which deals with
Chapter 202.

Under the facts as you pose them to us, if the Sheriff of
Macon County, acting in his official capacity as a peace officer,
desires to proceed in the matter of Mr. Britt under Chapter 475,
then it would appear under the Boulware opinion that you should
represent the Sheriff in preparing the petition, etc.

I am enclosing extra copies of the Boulware and Freeman
opinions for such use as you may have for them.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

enc.

cc: Mr. David Collins

INSURANCE: Within described certificate of membership offered by American Health & Welfare Association is a contract of insurance, and offering of the same to the public without complying with the insurance laws of Missouri constitutes a violation of Sections 375.300 and 375.310 RSMo 1959.

Opinion No. 206 (1962)

October 9, 1962

Honorable Jack L. Clay
Superintendent of the Division
of Insurance
Jefferson Building
Jefferson City, Missouri



Dear Mr. Clay:

This opinion is rendered in reply to your request reading as follows:

"Attached hereto is a Certificate of Incorporation bearing the name of American Health & Welfare Association and a Certificate of Membership entitled 'Red Cross Plan', together with three (3) photostatic copies of advertising regarding the American Health & Welfare Association.

"This association is not licensed as an insurance company with this Division. I respectfully request an opinion from your office, advising whether the attached papers constitute an insurance business and if in your opinion there is a violation under the laws of the State of Missouri."

The certificate of membership referred to in your request does not bear a serial number, nor is it completed to disclose the name of the member. For the purpose of this opinion it will suffice to quote the first page of the membership certificate as submitted, and to make specific reference to other provisions contained in the six pages making up the certificate of membership. Page 1 of the certificate of membership reads as follows:

**"AMERICAN
HEALTH AND WELFARE
ASSOCIATION**

**(A NOT-FOR PROFIT ORGANIZATION)
7530 Forsyth
Saint Louis 5, Mo.**

Honorable Jack L. Clay

"This certificate is Guaranteed Renewable and shall provide benefits for hospital, medical and surgical expenses incurred due to sickness or accidental bodily injury to the extent provided herein.

CERTIFICATE OF MEMBERSHIP

+

Red Cross Plan

This Certificate shall compensate the person named as the Principal Member in the Certificate Schedule below and all Covered Dependents, subject to all the conditions, provisions, limitations and exceptions contained herein, endorsed hereon or attached hereto against specified losses incurred while this Certificate is in force, and (a) resulting directly and independently

of all other causes from accidental bodily injury, or (b) resulting from sickness or disease contracted and commencing while this Certificate is in force, herein referred to such sickness or disease; providing, however, that such injury or such sickness conforms to and is in accord with the conditions stated in this Certificate.

CERTIFICATE SCHEDULE

Principal Member		Initial Dues	Renewal Dues	Mode of Payment	Maximum Surgical Benefit
					\$300.00
Maximum Daily Hospital Benefit			Maximum Benefit for Additional Hospital Expenses		
Per Day	Number of Days		1st 14 days	or 1st 44 days	or 45 days or more
\$	365		\$100.00	\$200.00	\$300.00
Certificate Number		Certificate Issue Date		First Renewal Date	
		No.	Day Year	No.	Day Year
Shall be entered upon receipt of initial dues		Shall be entered upon receipt of initial dues		Shall be entered upon receipt of initial dues	

CONSIDERATION: This Certificate is issued in consideration of the statements and agreements contained in the Application, a copy of which Application is attached to and made a part of this Certificate. The Association will not consider the Certificate and the benefits it contains in force until the Initial Dues, specified above, have been received by the Association.

James A. Walters

Secretary

Philip W. Molasky

President"

Honorable Jack L. Clay

On pages 3 and 4 of the certificate of membership we find the following subjects treated: "Renewal Agreement", "Definitions", "Eligibility for And Termination of Coverage", "Commercial Air Travel Passenger Coverage", "Exceptions and Reductions", "Hospital Room And Board Benefit", "Miscellaneous Hospital Expenses", "First Aid Benefits", "Medical Care", "Maternity Benefit If Member and Spouse are Covered", "Return of Dues Benefit for Accidental Loss of Life of Principal Member Only", and "Poliomyelitis Benefits-Residual Paralysis". Page 5 of the certificate of membership treats of "Surgical Operations Benefits" and lists over one hundred specific surgical operations covered with the amount of specific indemnity offered for each. Page 6 of the certificate of membership treats the following subjects with specific clauses: "Entire Contract Changes", "Grace Period", "Notice of Claim", "Claim Forms", "Proofs of Loss", "Time of Payment of Claims", "Payment of Claims", "Physical Examination and Autopsy", and "Legal Actions".

In State ex rel. Inter-Insurance Auxiliary v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss. * * *"

The words "indemnity" and "insurance" are alluded to in the following language from Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278:

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. [4 Words and Phrases, p. 3539.] Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In light of quoted language, and specific provisions referred to, supra, from the certificate of membership here being considered, it must be reasonably concluded that such certificate of membership, when negotiated, constitutes a contract of insurance.

Honorable Jack L. Clay

Section 375.310, RSMo 1959 provides, in part:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *"

Section 375.300, RSMo 1959, provides:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance division of this state the certificate authorizing him to act as such agent or solicitor, as required by section 375.010, or who shall act as agent or solicitor for any individual, association of individuals or corporation engaged in insurance business, before such individuals, association of individuals or corporation shall have been duly authorized and licensed by the superintendent of the insurance division of this state to transact business in this state, or after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisonment in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

It is not necessary to extend this opinion by discussing advertising material you furnished in addition to the certificate of membership here construed. We have concluded that the certificate of membership on its face constitutes a contract of insurance when fully entered into by American Health & Welfare Association and the member. You have informed this office that American Health & Welfare Association

Honorable Jack L. Clay

is not licensed as an insurance company by your Division. It necessarily follows that when American Health & Welfare Association negotiates the certificate of membership described in this opinion without meeting the requirements of Missouri's laws relating to organization and regulations of insurance companies, such corporation and persons so offering such certificates of membership will be subject to the penalties prescribed by Sections 375.300 and 375.310, RSMo 1959.

CONCLUSION

It is the opinion of this office that the certificate of membership, described in the foregoing opinion, when completed and issued by American Health and Welfare Association, constitutes a contract of insurance, and offering of the same to the public without meeting the requirements of Missouri's laws relating to organization and regulation of insurance companies will cause American Health & Welfare Association and their agents to be subject to the penalties prescribed by Sections 375.300 and 375.310 RSMo 1959.

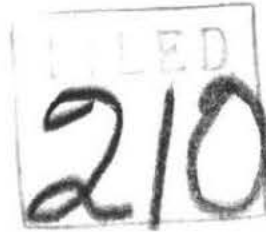
The foregoing opinion which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JO'M:MS:BJ

June 5, 1962



Honorable Francis Toohey, Jr.
Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Sir:

This is in response to your letter of May 7, 1962,
requesting an opinion from this office on the questions
as set out below:

"1. May a County Hospital Board deny
to a Doctor, who is licensed to practice
in the State of Missouri, authority to
practice within its hospital where it
has reason to believe that said Doctor
is incompetent in the prescription of
medicine.

* * *

"4. May a hospital staff which has
admitted a Doctor to the staff subsequently
dismiss said Doctor from the staff for
incompetency and if he is not on the
staff may the doctor be denied the
privileges of the hospital?"

You have also requested answers to questions numbered
2 and 3 in your letter which we respectfully decline to
consider as we have no authority or responsibility to furnish
answers to questions concerning the stated individuals'
liabilities.

In answering questions numbered 1 and 4, I am enclosing
a copy of an opinion dated July 19, 1961, from this office
to the Honorable T. E. Lauer, Prosecuting Attorney, Callaway
County, Missouri, relative to the authority of county

Honorable Francis Toohey, Jr.

hospitals to regulate the practice of doctors therein. I believe that a study of that opinion along with a reading of the case of Albert vs. Board of Trustees of Gogobic County Public Hospital, Michigan Supreme Court, 1954, found at 67 N.W. 2d 244, which was decided under a statute substantially identical with our statute Section 205.300, providing that the patient shall have the absolute right to employ his own physician and that the physician shall be in the exclusive charge and control of the care and treatment of such patient, will provide the answers to questions 1 and 4 above. The court in the above case stated that the equivalent to our board (the State Board of Registration for the Healing Arts in the State of Missouri) had the exclusive control and charge of the licensing and qualifications of physicians within the state and that the county hospitals could make no rules or regulations which would infringe upon this right. Especially is this so in the present case since from a perusal of the bylaws of the Perry County Memorial Hospital it appears that they are completely lacking in any rule and regulation (applicable to all physicians and surgeons practicing within the hospital) touching this subject. We do not here state whether a bylaw of the hospital regulating the prescription of medicine in a case such as you have outlined would be reasonable as to come within the enclosed opinion and cited case, as this is a fact situation and each case must be decided individually.

Hoping that the above will adequately answer your inquiries, I remain

Yours very truly,

THOMAS F. EAGLETON
Attorney General

Enclosure

RN:BJ

September 5, 1962

Opinion No. 212 answered by letter.
(Northcutt)

Honorable William B. Milfelt
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Mr. Milfelt:

In answer to your request of May 7, 1962, for an opinion of this office concerning the proper placing upon the ballot of the proposition for or against county zoning and planning, I wish to refer you to an opinion of this office which was rendered to you on April 6, 1960, page 5 of which sets out the proper statutory form of the ballot. The proposition must be submitted as stated.

House Bill 465, Laws 1951, page 406, which originally provided for county planning and zoning, includes Section 16a, which was codified as Section 64.530, RSMo 1959. It is clear from both a reading of the original bill and Sections 64.510 to 64.690, RSMo 1959, that had Section 16a of the original bill and Section 64.530 not been included the county court would have had authority, without the vote of the people, to provide for either or both county planning or zoning. All the inclusion of Section 16a of House Bill 465, Laws 1951, page 406, accomplished was to leave the decision to the people of the county as to whether they wished the protection and restrictions imposed by Sections 64.510 to 64.690.

Honorable William B. Milfelt

It is the opinion of this office that even though planning does include some phases of zoning and also the converse that House Bill 465, Laws 1951, page 406, leaves the choice of which shall be carried out to the county court and the only proposition actually to be voted on is whether the county court shall have the authority to put the provisions of Sections 64.510 to 64.690 into effect.

It is true the parentheses around the phrase "or planning" in Section 64.530 seem to have little reason and to carry out what was the apparent intent of the legislature in enacting these sections, it should be read as if the parentheses were omitted.

I believe that this letter will adequately answer your questions along with re-reading of the April 6, 1960, opinion to you, a copy of which I am enclosing.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

RN:BJ:jh

CRIMINAL COSTS:
ACQUITTAL:
INSANE DEFENDANT:

State is liable for costs in capital cases and those in which imprisonment in penitentiary is sole punishment, if the defendant is acquitted, even though the defendant is acquitted on the sole ground of insanity.

June 4, 1962

OPINION NO. 213

FILED
213

Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

We have your request for an opinion of this office as follows:

"We respectfully request your official opinion in regard to payment of costs by the State in a criminal case when the defendant is acquitted by reason of insanity.

"Section 550.040 states that in all capital cases and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the State. Section 546.510 through 546.540 refers to disposal of costs when a person has been adjudged insane.

"Our question is: Does the State pay the costs of the trial as provided in Section 550.040 or is the cost of the trial to be included in costs paid by the defendant or the County, as provided under Sections 546.510 through 546.540 inclusive?"

Section 550.040, RSMo 1959, referred to in your letter provides as follows:

Honorable Charles D. Trigg

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It is to be noted that the foregoing section provides for the liability for costs "if the defendant is acquitted." Other sections of Chapter 550 provide for the payment of costs in cases in which the defendant is convicted. If a defendant is placed on trial and a verdict reached, he is either convicted or acquitted. The mere fact that he may be acquitted on the ground that he was insane at the time of the commission of the offense charged does not in any way affect the ultimate result of acquittal. An insane person who commits an act which would otherwise be a crime is not guilty because of the absence of the requisite criminal intent, an essential ingredient of the crime. If he is found to have been insane at the time of the commission of the offense, the jury thereby finds that he lacked a criminal intent, and therefore must, of necessity, be acquitted.

Section 550.040, in our judgment, is plain and unambiguous and means exactly what it says. If the defendant is acquitted, irrespective of the reason therefor, then in those cases in which the State is liable (capital cases and those in which imprisonment in the penitentiary is the sole punishment for the offense), the costs must, of necessity, be paid by the State. In the situation presented by your letter, there can be no doubt that the defendant has been acquitted. In a case in which the word "acquitted" was for construction, State ex rel. Tudor v. The Platte County Court, 40 Mo. App. 503, it was held that where a defendant had been charged with seduction and prior to trial married the prosecutrix, with the result that a nolle prosequi was entered, such "nolle prosequi

Honorable Charles D. Trigg

amounted to an acquittal in the sense of the statute" here in question. That being so, it is all the more obvious that an acquittal on the ground of insanity is "an acquittal in the sense of the statute".

The provisions of Sections 546.510 through 546.540, RSMo 1959, in no way affect the liability of the State for the costs of the prosecution, as provided in Section 550.040. Section 546.510 provides, in substance, that when a person is acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not recovered from such insanity; and in case it is found that such person has so recovered, he shall be discharged from custody; but in case he is found not to have recovered from such insanity, "an order shall be entered of record by the Court that he be sent to a state hospital, designating it, and further requiring the sheriff or other ministerial officer of the court, with such assistance as may be specified in the order, to convey such prisoner to the hospital."

It is to be noted that if the jury finds that the accused has recovered from the insanity, on the basis of which he was found not guilty, then such person shall be discharged from custody, and the case is concluded. It is only where the jury finds that the accused has not entirely recovered that further proceedings are required, namely, an order of the Court and proceedings carrying out such an order.

Section 546.520, RSMo 1959, provides that if the prisoner is not a poor person, then the Court shall enter an order of record "directing that the cost which may accrue in carrying into effect the order made under Section 546.510, and all expenses for the support and maintenance of such person while in the care and custody of the officer and at the hospital, shall be paid out of the proceeds of the estate of such person." The section further provides that the Court in each succeeding term shall tax up, as long as it may be necessary, "such cost and expenses as may have accrued since the preceding term."

Honorable Charles D. Trigg

Section 546.530, RSMo 1959, provides that if the prisoner be a poor person, then "the cost of carrying out the order made under Section 546.510 shall be paid for by the county court out of the county treasury and all expense for the support and maintenance of such prisoner while at the state hospital shall be paid as is provided in the case of insane poor persons."

Section 546.540, RSMo 1959, provides for the payment of the expense of confining the insane person pending his removal to a state hospital.

We find no provision in any of the foregoing sections of Chapter 546 which have any reference to the costs of prosecution. The only costs provided for are costs incurred in carrying out the order of the Court requiring that the accused be sent to a state hospital and for the expenses in connection with such confinement. All of the foregoing costs and expenses accrue subsequent to the acquittal of the defendant, and in no way affect the liability of the State in situations in which it is otherwise liable for payment of costs by reason of the acquittal of the defendant.

We note that Section 550.040 in substantially its present form was enacted by the Laws of 1843, page 28, as Section 3 of "An Act concerning costs in criminal cases." At that time there was no provision in the statutes comparable to Section 546.510 through 546.540. This would indicate quite clearly that the purpose in enacting what is now Section 550.040 was to provide for the payment of costs in the event of acquittal in all cases, irrespective of the basis upon which the verdict of acquittal was arrived at.

The first statute providing for the consequences of an acquittal by reason of insanity was enacted in 1847 as part of "An Act to establish an Asylum for the Insane." Section 16 of that act, appearing on page 62 of the Laws of 1847, provided that in the event of an acquittal on the ground of insanity, if the jury should find that the person is still insane, "the Court before which the trial is had, if in the opinion of the Court it will be beneficial to such person or the public safety require it, shall cause such person to be sent to the Asylum at the cost of the county...."

Honorable Charles D. Trigg

Subsequently, in 1855, as part of "An Act for the government of the State Lunatic Asylum and the care of the Insane" (Laws 1855, page 142) more detailed provisions were made with respect to the disposition of a prisoner who was acquitted on the ground of insanity. These provisions are very similar to those in our present statutes, but still left to the Court's discretion as to whether the defendant should be committed to the asylum. We find nothing in these statutes which would indicate any legislative intent to eliminate the liability of the State for the costs of prosecution. The only provisions for the payment of costs relate to the costs of committing the defendant to the asylum and the expenses of such confinement.

CONCLUSION

It is the opinion of this office that in all capital cases and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the State even though such defendant is acquitted on the sole ground of insanity.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:mc:jh

Opinion No. 216
answered by letter.
(Albert J. Stephan)

June 13, 1962



Honorable Clyde F. Portell
State Representative
Ste. Genevieve County
Ste. Genevieve, Missouri

Dear Mr. Portell:

This is in response to your request for advice as to whether the City of Sainte Genevieve may properly pass and enforce an ordinance, the substantive provisions of which are:

"Section One: No Automobile-wrecking yard or junk yard shall be established maintained, or operated within fifty (50) feet of any highway, street, or alley within the city limits of the City of Ste. Genevieve, Missouri; unless such auto-wrecking yard or junk yard is screened from said highway, street, or alley by a tight board or other screen fence not less than ten feet high, or of sufficient height to screen the wrecked or disabled automobiles or junk kept therein from the view of persons using such highway, street or alley on foot or in vehicles in the ordinary manner.

"Section Two: Any person, firm or corporation who shall establish, conduct, own, maintain or operate any automobile wrecking yard or junk yard without complying with the provisions of this ordinance shall, on conviction, be guilty of a misdemeanor and shall be punished by fine not exceeding One Hundred Dollars (\$100.00) or by imprisonment in jail not exceeding (60) sixty days, or by both such fine and imprisonment."

Honorable Clyde F. Portell

We take notice of the fact that Sainte Genevieve is a city of the fourth class. As such, its powers, with respect to regulation of businesses, are set out in Section 94.270, R.S. Mo. 1959. Although that section includes no specific reference to the control of operation or location of automobile wrecking or junk yards, it does contain rather broad language:

"The mayor and board of aldermen shall have power and authority to regulate and to license and to levy and collect a license tax on auctioneers, druggists, hawkers, peddlers, banks, brokers, pawnbrokers, merchants of all kinds, . . . automobile agencies, and dealers, public garages, automobile repair shops or both combined, dealers in automobile accessories, gasoline filling stations, . . . and all other business, trades and avocations whatsoever. . . ."
(Emphasis supplied.)

The power of a city of the third class to regulate junk yards was recognized by the St. Louis Court of Appeals in *City of Washington v. Mueller*, (1949) 218 SW2d 801. In that case, the city attempted to enjoin the operation of an auto wrecking and junk yard on the grounds that it was a public nuisance. The city had previously ordered the abatement of the operation after a meeting of the city board of health in which the desirability of the junk yard was considered. The essence of the court's ruling is made clear from the following excerpt found at page 803:

"* * * A junk yard is necessarily an unsightly place and is an eyesore in a residential district, and is subject to regulation by the city and restriction as to location under proper ordinances, but is not necessarily a public nuisance to be abated as a menace to public health. The city in this case fully recognizes that a junk yard is a legitimate business, and has fixed a license tax to be paid by the person conducting a junk yard. Section 6986, RS 1939,

Honorable Clyde F. Portell

Mo. RSA § 6986, gives the city power to levy and collect a license tax, regulate, restrain, prohibit and suppress several businesses, including automobile wrecking shops and junk dealers. This cannot be construed to mean that the city can both levy and collect a license tax and regulate such businesses, and at the same time restrain, prohibit and suppress them. It must do one or the other, and this plaintiff has seen fit to provide for collecting a license tax rather than prohibiting a junk yard. * * *

At page 804, the court said:

"* * *It might be very desirable for the city to proceed under Section 6986 and pass ordinances to prohibit and suppress junk yards and automobile wrecking shops anywhere in the city limits, or within certain limits of the city. It has never done so. And even though all junk yards, and especially this one, are unsightly, an equitable court cannot sanction the confiscation of private property for aesthetic purposes, and especially so where the gist of the complaint is that the junk yard is a nuisance because of being a menace to public health. * * *
(Emphasis supplied.)

Section 6986, RSMo 1939, with some revisions not relevant here, is now denominated as Section 94.110, RSMo 1959. That section sets out the powers of cities of the third class and specifically authorizes the regulation of "auto yards" as well as the regulation and suppression of "auto wrecking shops" and "junk dealers."

It could, of course, be argued that the specific mention of auto wrecking shops and junk dealers in the statute relating to cities of the third class prevents their being read by inference into Section 94.270, supra. To accept such an argument, however, would be to deny the universality of the reference in Section 94.270 to

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"merchants of all kinds" and "all other business, trades and avocations whatsoever" We believe that the all-encompassing nature of those phrases precludes any such argument.

Moreover, such an argument was rejected by the St. Louis Court of Appeals in *City of Flordell Hills v. Hardekopf*, (1954) 271 SW2d 256 in which the contention was made that, since a statute relating to cities of more than 300,000 persons permitted a graduated license tax based on sales in the prior year, cities of the fourth class were limited to a flat rate tax because the statutes pertaining to them made no provision for a graduated tax. The court said, l.c. 257:

"Where defendant's argument goes amiss is in failing to recognize that the powers granted to each class of cities in this state are for the most part the subject of separate and distinct statutes which only apply to the class of cities to which they relate. *City of Aurora v. McGannon*, 138 Mo. 38, 45, 39 S.W. 469. The fact, therefore, that the power to graduate the amount of a merchant's license tax in proportion to his sales during the preceding fiscal year may only be given in express terms to cities of more than 300,000 population is no indication that such method of determining the tax is thereby denied to cities of other classifications. Indeed, if such provision in Section 92.040 has any significance at all in connection with the matter now before us, it is only that it constitutes a definite legislative declaration that the fixing of such a tax upon the basis of gross sales is of itself neither arbitrary nor unreasonable."

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On the basis of the foregoing, we are persuaded that the City of Ste. Genevieve may properly enact an ordinance, under the authority of Section 94.270, whereby the operation of automobile wrecking yards and junk yards would be regulated to the extent that such yards may not be maintained within fifty feet of any city street or alley unless such yard is screened from public view.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:ms

SCHOOL DISTRICTS:
SCHOOL TEACHER
RETIREMENT AGE:
TEACHERS' FUND:
SUBSTITUTE TEACHER:

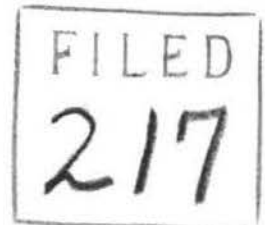
Teachers' salaries must be paid from fund provided in Sec. 165.110, RSMo 1959. In school districts in this state not in cities that have a population of 75,000 or more, teacher is retired July 1 next after attaining age 70 and may thereafter teach only under provisions of Sec. 169.560; school board may not legally pay teacher's salary from fund provided in Sec. 165.110 past July 1 next after teacher has reached age 70 except under provisions of Sec. 169.560; school board may not legally contract with teacher who is retired by provisions of Sec. 169.060 except under provisions of Sec. 169.560.

Opinion No. 217 (1962)

July 25, 1962

File No. 217

Honorable Arthur B. Cohn
Prosecuting Attorney
Pulaski County
Waynesville, Missouri



Dear Mr. Cohn:

This is in reply to your letter of May 14, 1962, requesting an opinion from this office in answer to the following question:

"If the school board hires a teacher who is of the retirement age, to-wit: 70 years of age, can the school board legally pay her salary from the regularly appropriated teachers fund or must her salary be paid from a different fund?"

Section 169.010, paragraph 6, defines "teacher" as follows:

"'Teacher' shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school, state college or state teachers' college on a full-time basis and who shall be duly certificated under the law governing the certification of teachers; any county superintendent of schools, assistant county

Honorable Arthur B. Cohn

superintendent of schools and those employed by county superintendents of schools upon a full-time basis and who shall be duly certified under the law governing the certification of teachers; and the state superintendent of public schools or commissioner of education, persons employed in the state department of education or by the state board of education in an executive capacity and other persons employed by said state board of education on a full-time basis who shall be duly certificated under the law governing the certification of teachers; and persons employed by the board of trustees of the public school retirement system of Missouri on a full-time basis who shall be duly certified under the law governing the certification of teachers; provided that this clause shall not be construed to include employees of the University of Missouri or Lincoln University."

For our purposes the above definition of the term "teacher" is sufficient and is adopted for the purposes of this opinion.

Having defined the term "teacher", we must now determine in what manner and from what source a teacher in Missouri may legally be paid, and in this connection we find that disbursement of all school money is governed and controlled by Section 165.110, RSMo 1959, which has contained within it specific references to teachers. This section provides that all teachers' salaries must be paid out of the specified teachers fund. The statutes are completely silent as to any other legal method of payment of teachers' salaries.

As may be seen from the above, teachers' salaries may be paid only from the authorized teachers fund as provided by Section 165.110, RSMo 1959, supra; however, it does not answer the question of whether a teacher, age seventy or over, may be paid from this fund. To do this it is necessary to turn to other statutes and determine whether there is an age limit beyond which a person may not teach. If there is a legally established age limit beyond which a person may not teach it would follow that any payment to such person would be an illegal payment of public funds and therefore prohibited.

Honorable Arthur B. Cohn

We turn in this regard to Chapter 169, RSMo 1959. Sections 169.010 to 169.130, inclusive, provide for the retirement of teachers in school districts of less than seventy-five thousand. The districts embraced within this act are set out in Section 169.020, RSMo 1959, as follows:

" * * * The system so created shall include all school districts in this state, except those in cities that had populations of seventy-five thousand or more according to the latest United States decennial census, and such others as are or hereafter may be included * * *"

The above section includes the Waynesville district because it is not a district in a city of more than seventy-five thousand.

Section 169.050, RSMo 1959, provides in part that:

"* * * all employees as herein defined of districts included in the retirement system thereby created shall be members of the system by virtue of their employment." (underscoring added)

"Employee" is defined by Section 169.010, RSMo 1959, as synonymous with "teacher". Therefore, by operation of this chapter "teachers" are members of the retirement system by virtue of their employment.

The above sections make membership in the public school retirement system of Missouri and employment as a teacher dependent one upon the other and bound together. Membership in the retirement system is a legal qualification for a "teacher".

Section 169.060, RSMo 1959, provides that a member (which by operation of Section 169.050 includes teachers) of the public school retirement system of Missouri must retire upon reaching age seventy by the following provision:

"* * * a member shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years," * * *"
(underscoring added)

Honorable Arthur B. Cohn

Therefore, the phrase "shall be retired automatically" directs that the individual member has no choice or volition as to whether he will or will not continue as a member of the retirement system and thereby, as a teacher, he is retired by operation of the statute.

It may be seen that by the enactment of Section 169.060, RSMo 1959, the Legislature intended that retirement or withdrawal from active service as a member of the retirement system was to be mandatory upon said member and upon July first next after reaching the age of seventy years a member is by law rendered incapacitated to continue in active teaching service in the public schools contained within the retirement system.

We may further illustrate the fact that a "teacher" may not teach beyond July 1 following the attainment of age seventy by reading Section 163.080, RSMo 1959, which provides as follows:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; * * *"
(underscoring added)

In connection with the above quoted portion it may be seen that one of the legal qualifications for a "teacher" is membership in the retirement system as provided by Section 169.050, supra. It would follow that when a "teacher" is retired by operation of Section 169.060, RSMo 1959, supra, the "teacher" is no longer legally qualified and therefore, by operation of Section 163.080, supra, the school board would have no authority to contract with and employ the "teacher", and any payment to such "teacher" would be an illegal payment of public funds and therefore prohibited.

It will be noted that the absolute retirement of "teachers" at age seventy is modified to the extent that a retired teacher over age seventy may serve as a substitute teacher not to exceed sixty days in any one school year by the provisions of Section 169.560, RSMo 1959.

CONCLUSION

Therefore, it is the opinion of this office that:

1. A school board may not legally pay a teacher's salary from a fund other than the teachers fund provided by Section 165.110, RSMo 1959.

Honorable Arthur B. Cohn

2. In school districts in this state not in cities that have a population of seventy-five thousand or more:

A. A "teacher" is automatically retired July first following the attainment of the age of seventy years and may not thereafter actively engage in teaching in public schools, except under the provisions of Section 169.560 as a substitute teacher;

B. A school board may not legally pay a teacher's salary from the teachers fund created by Section 165.110, RSMo 1959, beyond July first next after the teacher has attained seventy years of age, except under the provisions for a substitute teacher as contained in Section 169.560;

C. A school board may not legally contract with and employ a "teacher" who is retired by the provisions of Section 169.060, RSMo 1959, except under the provisions of Section 169.560 regarding substitute teachers.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert R. Northcutt.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

RN:BJ

EMPLOYMENT AGENCIES:

Frederick Chusid & Company is a private employment agency and required under Section 289.010, RSMo 1959, to be licensed by the state.

Opinion No. 218 (1962)

September 20, 1962

Honorable Don L. Cummings
Director
Division of Industrial Inspection
Department of Labor and
Industrial Relations
State Office Building
Jefferson City, Missouri

FILED
218

Dear Mr. Cummings:

In your letter of May 11, 1962, in which you enclose some advertising used by Frederick Chusid & Company you state:

"It is the opinion of this department that since this company is charging a fee for their services and, in our opinion, assisting in obtaining employment by getting prospective employee and employer together, they should therefore be licensed as a private employment agency.

"This department would appreciate a ruling on the above."

Section 289.010, RSMo 1959, provides in part:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the director of the division of industrial inspection of the state department of labor and industrial relations. * * *"

Honorable Don L. Cummings

It is clear that under this statutory provision when any person, firm or corporation opens, operates or maintains an employment office or agency for hire in this state (or where a fee is charged to either the applicant for employment in securing a job or where a fee is charged the employer for obtaining help) a license must be secured from the Division of Industrial Inspection.

In the informational circular which you submitted with your request concerning the services offered by Frederick Chusid & Company, it is stated among other things that their staff will furnish or provide:

"In addition, during the planning of the marketing program, the Staff and client will select and agree to certain specific markets, where Frederick Chusid and Company Sponsorship will be given in mailings and direct contact. The purpose of this Sponsorship is to protect the client's identity, to save the client's time, or to add prestige to the client's presentation.

"Within these specified markets, the Staff will make initial contacts, endorsing the client's qualifications. They will follow through on prospective opportunities and investigate and evaluate prospective employers. The Staff will communicate their knowledge and evaluation of the client to these prospective employers and protect the confidence of each party, until there is a valid basis for mutual interest. Ultimately, the Staff will attempt to arrange to have the client meet those prospective employers, where, based on the information available, it is felt that the opportunity would be desirable and the client well qualified.

"The fee for this Program is \$1,400."

In the advertisement which appeared in the Wall Street Journal on Monday, July 10, 1961, a copy of which you have submitted, Frederick Chusid & Company is advertising a position that is available as a sales manager with an employer they represent and they solicit applications from

Honorable Don L. Cummings

any person interested in such work. The location of the office and telephone number in St. Louis is given in this advertisement. In the same issue of the Journal Frederick Chusid & Company in another advertisement, a copy of which you have submitted, offers their services to individuals in helping them secure employment. Frederick Chusid & Company state that they will perform this service without revealing the name of the employee.

In each of these advertisements Frederick Chusid & Company offers their services in getting a prospective employee and employer together for the purpose of employment. This service is performed only for a fee to be paid either by the employer or by the employee. Under Section 289.010, supra, if a fee is charged from either the employee or the employer for such service it comes within the licensing provision of this statute. The fact that other services may be furnished the employer or the employee such as an evaluation by psychologists of the prospective employee's abilities or services which they may render the employer in helping the employer choose the best qualified employee does not prevent the service rendered by Frederick Chusid & Company from being within the terms of this statute.

An employment agency may be defined as an agency for the brokerage of labor for a fee paid by applicant for employment or by a prospective employee, or as any person or corporation engaged in the business of finding positions or employment. Florida Industrial Commission vs. Manpower, 91 So. 2d 197.

CONCLUSION

Based on the information you have submitted, it is our opinion that Frederick Chusid & Company is engaged in representing employers in obtaining employees as well as representing employees in securing employment; that they charge a fee from either the employer or employee for such services, and under the provisions of Section 289.010, RSMo 1959, they are required to be licensed by the Division of Industrial Inspection.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

MM:BJ

(Opinion request No. 220 answered by this letter.)

May 21, 1962

FILED
220

Honorable Edgar J. Keating
State Senator, Ninth District
Home Savings Building
1006 Grand Avenue
Kansas City 6, Missouri

Dear Senator Keating:

This will acknowledge your letter of May 15, 1962, requesting an opinion of this office, as follows:

"I would appreciate it if you will give me an opinion on the following facts.

"On September 14, 1961, Ben W. Oliver, a resident of the 13th ward, Kansas City, Mo., filed a declaration of candidacy for nomination for the office of Constable in the 2d Magistrate District of Jackson County. On December 20, 1961, the Boards of Election Commissioners of Kansas City, Mo. and of Jackson County, Mo. held a joint meeting for the purpose of considering numerous re-districting plans including the Magistrate District. At that meeting they adopted a plan which changed the boundaries of the 2d Magistrate District in which Mr. Oliver had filed. Mr. Oliver did not refile in the new district. The number of the District was not changed and Mr. Oliver resides in both the old and the new districts. I am enclosing herewith official maps of the Magistrate Districts as of September, 1959, and December, 1961, for your information.

"I will appreciate your opinion as to whether Mr. Oliver is entitled to have his name on the primary ballot as a candidate for Constable in the 2d District of Jackson County, Mo."

Hon. Edgar J. Keating

May 21, 1962

Section 19, Article V, of the Constitution of Missouri provides that "after each census" the boards of election commissioners "shall divide counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be" This constitutional duty is mandatory, and the necessary effect is that the old districts automatically go out of existence after each census. Within the constitutional limitations, the Board of Election Commissioners may establish districts which are wholly unlike the old districts as to the numbering thereof or the territory comprised therein. Whether it does so or not, the districts are wholly new and come into existence as of the date the Board of Election Commissioners establishes the same. This office so ruled as to Clay County in Opinion No. 57 to Richard E. McFadin, dated February 15, 1962.

The situation is comparable to that pertaining to senatorial and representative districts. In an opinion dated December 27, 1961, to George H. Morgan, this office ruled that in view of Section 3, Article III, of our Constitution creating a duty on the part of the County Court to divide the county into districts, after being notified of the number of representatives to be elected in said county after each census, the old districts go out of existence. Our Supreme Court, in Preisler v. Doherty, 365 Mo. 460, 284 SW2d 427, 1.c. 436, expressly ruled that all senatorial districts must go out of existence after each decennial census. A ruling similar to the Morgan opinion was made by this office under date of August 29, 1951, to Paul C. Calcaterra. In view of all the foregoing and a reconsideration of the applicable constitutional provisions, we are of the opinion that the former magistrate districts in Jackson County went out of existence after the new census, and that it then became the duty of the Board to establish new districts.

Section 63.010, RSMo 1959, which provides for the election of a constable in counties of the first class, provides, in part, that there shall be elected "in each magistrate district in such counties a constable". This can mean only that until the magistrate district is established, there is no magistrate district within which

Hon. Edgar J. Keating

May 21, 1962

a constable may be elected. Hence, it is our opinion that until the new magistrate districts were created, any declaration of candidacy for the office of constable theretofore filed is a nullity, there being no office in existence for which the candidate may seek nomination. In the Morgan opinion, this office so ruled with respect to declarations of candidacy for nomination for senators and representatives in Jackson County. For your information we enclose copies of the three opinions herein cited.

In the opinion of this office, the declaration of candidacy which Mr. Oliver filed on September 14, 1961, for Constable, Second District, is a nullity for the reason that there was no second magistrate district then in existence for which a valid declaration of candidacy could be filed. Therefore, unless there was some action taken by the Board of Election Commissioners which would constitute a refiling of the declaration after the second magistrate district was established, Mr. Oliver would not be entitled to have his name on the primary ballot as a candidate for constable in the Second Magistrate District of Jackson County.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

Enclosures

JN:mc

June 12, 1962



Honorable John M. Dalton
Governor of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Dalton:

On May 16, 1962, you requested an informal opinion from this office concerning an interpretation of the recently enacted Constitutional Amendment, Article IV, Section 30 (a) (b).

By way of background, this new gas tax amendment provides for the apportionment of gas tax revenue between the state, counties and cities. After certain specified deductions, the remaining net proceeds are distributed with 5% going to the credit of the counties, 15% allocated to the certain incorporated cities, towns and villages, while the remaining net proceeds go to the state. With reference to the 15% to be shared in by the cities, Section 30 (a) (2) states that the money is to be used:

"* * * solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes, and the use thereof being subject to such other provisions and restrictions as provided by law * * *."

In your letter of May 16, 1962, you ask the following questions:

1. May a municipality issue revenue bonds payable from the municipality's share of the proceeds of the tax?

Honorable John M. Dalton

2. May funds payable to municipalities be used as matching funds to augment payments by abutting property owners in a street construction program?

The answer to your first question is in the negative. The gas tax amendment does not grant to cities the power to issue bonds of the nature described by you, and we find no other constitutional or statutory provision which authorizes cities to issue such bonds.

Respecting your second question, the gas tax amendment enumerates certain "purposes" for which municipalities are limited in spending allotted gas tax revenues. As long as the money is being spent for one of the specified "purposes," then the intent of the amendment is being fulfilled. Street construction is an enumerated "purpose" and gas tax money can be spent in its attainment. When the money is received by municipalities, it becomes "earmarked" general revenue. If a particular municipality has authority to pay the cost of street construction in whole or in part out of its general revenue funds, then in such circumstances and to the same extent gas tax money can be spent for this purpose.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGB:MW
(JGS:ml)

CRIME: An individual who sets a fire on his own
MISDEMEANOR: land, which spreads to the land of another,
LAND: may be prosecuted for a misdemeanor under
REAL PROPERTY: Section 560.585, RSMo 1959, only if he
FIRE: knowingly and negligently permitted said
fire to burn uncontrolled on his own land
and allowed it to spread to the land of
another.

OPINION No.224[1962]

June 6, 1962



Honorable Paul L. Bell
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Mr. Bell:

This is in reply to your opinion request of May 17,
1962, wherein you set forth the following factual situation:

"I have recently had some charges in violation of Section 560.585 Missouri Revised Statutes. I would appreciate your opinion as to whether or not you consider the following factual situation a violation of this statute:

"Land owner 'A' desiring to burn his own land, sets a fire and does so. He then discovers that the fire is getting out of control and spreading towards the land of 'B'. 'A' is not negligent in any manner in his attempt to control the fire on his land, but nevertheless the fire escapes and burns 'B' land. 'A' has no control or possession of the land of 'B'. "

Section 560.585, RSMo 1959, states:

"Any person who carelessly sets on fire or in any manner causes to be set on fire any forest land, brush land, grain stubble or grass or other combustible material, being or growing on lands not his own or not in his possession or control, or who knowingly and negligently permits a fire to burn uncontrolled

Honorable Paul L. Bell

on his own land or on land in his possession or control and allows the fire to spread to the property of another, is guilty of a misdemeanor."

Because the defendant in your factual situation, started the fire on his own land, the State would have to allege and prove that he knowingly and negligently permitted said fire to burn uncontrolled on his own land and allowed it to spread to the property of another in order to prosecute under Section 560.585, RSMo 1959.

In *Miller v. Sabinske*, 322 S. W. 2d 941, 946, the Kansas City Court of Appeals stated:

"[2] The rule is that when an owner of property sets a fire on his own premises for a lawful purpose, and not in violation of any statute, he is not, in the absence of a statute to the contrary, liable for damages caused by the spread of a fire to the property of another unless he was negligent in starting or negligent in controlling the fire. *Steffens v. Fisher*, 161 Mo. App. 386, 143 S. W. 1101; *Belk v. Stewart*, 160 Mo. App. 706, 142 S.W. 485; Annotation, Fire - Liability For Spread, 24 A.L.R. 2d 241,254.

"[3] Affirmatively stated, ordinary care is the measure of diligence required to free oneself from liability for the spread of a fire lawfully set on one's premises. Ordinary care, in this connection, has been defined as such care, caution and diligence as a prudent and reasonable man would exercise, under the circumstances, to prevent damage to others. 22 Am. Jur., Fires, Sec. 16, page 605; Annotation, Fire - Liability For Spread, 24 A.L.R. 2d 259; *Steffens v. Fisher*, supra.

Honorable Paul L. Bell

"[4] What amounts to ordinary care depends upon the particular circumstances and is generally a question of fact unless the evidence is such that reasonable men could not infer negligence therefrom. Willard v. Bethurem, Mo. App., 234 S.W. 2d 18; Jansen v. Aholt, Mo. App., 189 S. W. 2d 121."

CONCLUSION

An individual who sets a fire on his own land, which spreads to the land of another, may be prosecuted for a misdemeanor under Section 560.585, RSMo 1959, only if he knowingly and negligently permitted said fire to burn uncontrolled on his own land and allowed it to spread to the land of another.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc

INSURANCE: Articles of Incorporation of Missouri Mutual Indemnity Company.

June 5, 1962



Honorable Jack L. Clay
Superintendent of the
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

In compliance with your request of May 18, 1962, a copy of the original Articles of Incorporation of the proposed Missouri Mutual Indemnity Company, together with proof of publication of the same as required by Section 379.030 RSMo 1959, have been reviewed by this office pursuant to the directive contained in Section 379.220 RSMo 1959.

It is the opinion of this office that the Articles of Incorporation of the proposed Missouri Mutual Indemnity Company, to be organized pursuant to the provisions of Sections 379.205 to 379.310 RSMo 1959, are in accordance with the provisions of said cited statutes, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

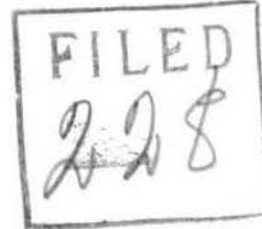
Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO:M:at

(Opinion request No. 228 answered by letter.)

May 24, 1962



Honorable Shandy A. Stewart
Member, House of Representatives
St. Clair County
Lowry City, Missouri

In re: Can a non-resident of the City
of Osceola be a qualified member
of the City of Osceola Park Board?

Dear Mr. Stewart:

This is to acknowledge receipt of your recent opinion request in regard to the above-captioned matter.

Although we have not been advised as to the contents of the city ordinance referred to in said request, we were advised in said request that the Osceola Park Board was organized under the provisions of Sections 90.500 - 90.570, RSMo 1959.

In regard to the question presented herein, Section 90.520, RSMo 1959, states as follows:

"When any incorporated city or town shall have decided to establish and maintain public parks under sections 90.500 to 90.570, the mayor of such city shall, with the approval of the legislative branch of the municipal government, proceed to appoint a board of nine directors for the same, chosen from the citizens at large with reference to their fitness for such office, and no member of the municipal government shall be a member of the board."
(Emphasis provided.)

Honorable Shandy A. Stewart

As Osceola is a fourth class city, your further attention is directed to Section 79.250, RSMo 1959, which states as follows:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office, or who is not a resident of the city." (Emphasis provided.)

A case involving the preceding section indicates that a city of the fourth class is without power to appoint a non-resident engineer to design and supervise street improvements. City of Jackson v. Houck, 43 S.W.2d 908, 226 Mo. App. 835.

It would appear, therefore, from the foregoing authorities that a non-resident of the city of Osceola would not be a qualified member of the city of Osceola Park Board.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PNS:mc:jh

June 18, 1962



Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

We are in receipt of your letter of May 22, 1962,
wherein you request an opinion of this office as follows:

"A question has arisen as to the interpretation of the Rules of practice and procedure in municipal courts, with particular reference to Rule 37.90 and 37.91.

"In a case involving alleged violation of an ordinance of the City of Ash Grove, Missouri, an affidavit disqualifying the Municipal Judge at Ash Grove was filed pursuant to Municipal Rule 37.90. The question then arose as to who would be considered 'another Judge authorized by law to hear such case' in accordance with Rule 37.91. We need an opinion as to whether the case should be transferred and removed to (1) a Magistrate Judge in Greene County, Missouri, (2) a Circuit Judge in Greene County, or (3) a Municipal Judge of another Municipality located in this county.

"We will appreciate the advices of your office with respect to the proper

Judge to whom the case should be transferred and removed."

We note from the 1961-1962 Blue Book of the State of Missouri (p. 1075) that the City of Ash Grove, Missouri, is a city of the fourth class. Section 98.500, RSMo 1959, which deals with the office of police judge in cities of the fourth class, reads as follows:

"The mayor and board of aldermen of cities of the fourth class may, by ordinance, provide for the election of police judges in such cities, who shall be elected at the regular city elections, and who shall, when so elected, have exclusive jurisdiction to hear and determine all offenses against the ordinances of the city in which he was elected; provided, that when such police judges shall be so elected, then the jurisdiction in sections 98.500 to 98.660 herein conferred on the mayor to hear and determine cases for the violation of city ordinances shall be held to refer to the police judge elected under this section; provided further, that in case of the absence, sickness, or disability in anywise of such police judge, or in case of vacancy in such office, the mayor shall perform all such duties until the disability is removed or the vacancy is filled."

Inasmuch as this section provides that the mayor of a fourth class city having a police judge shall perform the duties of the police judge during the "absence, sickness or disability in anywise" of the police judge, it is our opinion that the mayor would therefore be the other judge authorized by law, as provided in Supreme Court Rule 37.91, to sit during the disqualification of the police judge.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

SOCIAL SECURITY:
CITY COLLECTOR:
EMPLOYEE:

The city collector of Jackson, Missouri, is an employee of such city and subject to OASI coverage under the agreement between such city and the State.

August 22, 1962



OPINION NO. 236

Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested the official opinion of this office on the following question:

"Is the City Collector of the City of Jackson, Missouri, an employee of such city and subject to OASI coverage under the agreement between the city and the state or is such collector self-employed?"

The agreement to which you refer was entered into pursuant to Section 105.350, RSMo 1959, and covers all eligible "employees" of the City of Jackson. As defined therein, the term "employee" means "elective or appointive officials and employees of the Political Subdivision." A similar definition of "employee" is contained in Section 105.300, RSMo 1959, namely, "elective or appointive officers and employees of any political subdivision of the state." And see 42 U.S.C.A. Section 418 (b) (3) which provides that the term "employee" includes an officer of a political subdivision.

Under the agreement in question, "all services performed by individuals as employees of the Political Subdivision", with certain exceptions not here pertinent, are included. Similarly, Section 105.300, RSMo 1959, defines the term "employment" as "any service performed by an employee" of the political subdivision.

We note also that Section 105.350, RSMo 1959, expressly provides that no plan for extending the benefits of OASI to employees of a political subdivision may be approved unless it provides that "all services which constitute employment as defined in Section 105.300 and are performed in the employ of the political subdivision" are covered. Significantly, 42 U.S.C.A., Section 418 (c), authorizes the exclusion from coverage, upon the request of the State, of services in any class of elective positions or positions

Honorable Charles D. Trigg

the compensation for which is on a fee basis. However, our statute evidences the legislative intent that no such exclusions may be requested. And the agreement itself, in conformity to the statute, makes no such exclusion.

The city collector of Jackson, Missouri, is an elective officer of that political subdivision. He is elected for a term of two years, Section 79.050, RSMo 1959, but may be removed from office for cause shown, as any other elective officer of that city, Section 79.240, RSMo 1959. Various statutes provide for and relate to the duties the city collector is required to perform. For example, Section 95.360, RSMo 1959, provides as follows:

"It shall be the duty of the city collector to pay into the treasury, monthly, all moneys received by him from all sources which may be levied by law or ordinance; also, all licenses of every description authorized by law to be collected, and all moneys belonging to the city which may come into his hands. He shall give such bond and perform such duties as may be required of him by ordinance."

Among other statutory provisions relating to the duties of a city collector are Sections 79.310, 94.280, 94.290, 94.230, 94.320, and 94.330, RSMo 1959.

The city collector, as all other officers of the city, is required to take and subscribe to an official oath and give bond to the city before entering upon the duties of his office. Section 79.260 and Section 95.360.

Pursuant to the foregoing statutes relating to cities of the fourth class, the City of Jackson has enacted an ordinance setting forth the duties of the collector and requiring bond to be furnished. That ordinance (No. 757) provides in part as follows:

"(5) COLLECTOR TO PAY OVER. It shall be the duty of the City Collector to make weekly deposits in the City Treasury of all moneys received by him from all sources, whatever, which may be levied by law or ordinance; also all licenses of every description authorized by law to be collected, and all moneys belonging to the city which may come into his hands. For which deposits the said collector shall take receipts from the City Treasurer and at the time of making his monthly

Honorable Charles D. Trigg

report, he shall present all receipts for the previous month to the Treasurer, who shall give him duplicate receipts for the total month's deposits or payments to the Treasurer, and one of such receipts shall be filed with the City Clerk, who shall endorse the date of filing thereon and preserve the same in the files of her office."

Clearly, the city collector of Jackson, Missouri, is an "employee" of the City of Jackson whose services are covered by the agreement between the city and the state and not a self-employed individual. We can perceive no distinction in this respect between the office of city collector and that of any other elective officer of the City of Jackson who is covered by said agreement. The suggestion has been made that there is such a distinction based upon the contention that the city collector receives no "wages." Under the facts, there is no basis for such contention.

The term "wages" is defined in Section 105.300, RSMo 1959, as "all remuneration for employment as defined herein." With respect to the compensation of the city collector, Section 79.270, RSMo 1959, provides as follows:

"The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

Ordinance No. 757 of the City of Jackson, above referred to, enacted pursuant to the authority of Section 79.270, fixes the compensation of the city collector as follows:

"(6) COMPENSATION OF COLLECTOR. The City Collector shall receive as full compensation for his services remuneration as follows: One and one-half (1 1/2) per centum on all revenue from water and light collections; Three (3) per centum on general taxes on real and personal property taxes, licenses and all other revenues collected."

From time to time thereafter, other ordinances have been enacted changing the amount of the compensation of the city collector. The last such ordinance of which we have been informed is No. 1571, which, to the extent here relevant, provides as follows:

Honorable Charles D. Trigg

"Section 1. That the compensation of the City Collector of the City of Jackson, Missouri, shall be fixed at the sum of one and one-fourth per cent of the funds from all general taxes levied and collected in the City of Jackson, Missouri, and the City Collector shall receive the further sum of one and one-fourth per cent (1 1/4%) from all water and light funds collected in the City of Jackson, Missouri."

It is thus apparent that the city collector of Jackson receives remuneration for the services he performs as an officer of the city. This remuneration constitutes "wages" as defined by the statute. It is to be noted that the compensation the collector receives is a percentage of the revenue he collects. This revenue is money collected for the city and belongs entirely to the city, and the collector must account therefor. The fact that the collector is paid out of such money so collected by him does not alter the fact that he receives remuneration or "wages" from the city for the services he performs on behalf of such city.

Section 105.370, RSMo 1959, requires each political subdivision whose plan has been approved to pay to the trustee, with respect to wages, contributions in the amounts and at the rates specified in the agreement. Each such political subdivision is authorized to impose upon its employees as to covered services a contribution with respect to wages not exceeding the amount of the employee tax which would be imposed by the Federal Insurance Contributions Act and to deduct the amount of the contribution from the wages when paid. Hence, the city could have required such contribution from the collector, to be deducted from the commissions payable to him. Whether it did so or not, the city is liable for the full amount agreed to be paid. Section 105.370 expressly provides: (1) that contributions collected from the employee shall be paid to the trustee "in partial discharge of the liability of the political subdivision" and (2) that failure to deduct the contribution shall not relieve the employer of liability therefor.

We note also that under the applicable federal law, the compensation to which the city collector is entitled could in no event be deemed "net earnings from self-employment." 42 U.S.C.A. Section 411 (a), and 26 U.S.C.A. Section 1402 (a) define that term as meaning the gross income derived by an individual from any "trade or business" carried on by such individual. 42 U.S.C.A. Section 411 (c) (1), and 26 U.S.C.A. Section 1402 (c) (1), expressly exclude from the term "trade or business"

Honorable Charles D. Trigg

the performance of the functions of a public office. Clearly, the compensation of the city collector arises from the performance of his functions as a public officer.

CONCLUSION

It is the opinion of this office that the city collector of the City of Jackson, Missouri, is an employee of such city and subject to OASI coverage under the agreement between such city and state, and that the City of Jackson is liable under such agreement for all payments agreed by it to be made with respect to the wages of such employee.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN: gm: jh

INSURANCE:

Articles of Incorporation of
Farm and Home Insurance Company.

June 26, 1962



Honorable Jack L. Clay
Superintendent of the
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Clay:

Pursuant to your request of June 8, 1962, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Farm and Home Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1959, and not inconsistent with the Constitution and Laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO:M:AT

OPINION NO. 251 ANSWERED BY LETTER.

June 12, 1962



Mr. Sidney B. McClanahan
Attorney at Law
110 S. Central - Room 400
Clayton 5, Missouri

Dear Sid:

As you know, this office is limited in the rendering of "official" opinions to certain statutorily designated public officials. Therefore, the following answer to your letter of June 4, 1962 is in the nature of an unofficial commentary, not an official opinion.

Your letter, in essence, raises two questions:

1. Can the State compensate committee people for their party service? and
2. Can the State prohibit such persons from holding public office or public jobs at the same time?

I will attempt to answer these questions under:

- a) existing state law; and
- b) effect of statutory enactment.

I am of the opinion that under existing state laws neither state payment of compensation to committee people, nor prohibition of their holding other public office is possible. But that to allow these practices, they could be made possible by statutory enactment and would not need an amendment to the Constitution.

Mr. Sidney B. McClanahan

The present Missouri Statutes, Sections 120.750 through 120.840, RSMo 1959, that provide for party committees and committee people do not provide for compensation of these public officers. It has been well established in Missouri that a public officer is not entitled to fees or compensation unless provided by statute, Williams v. Chariton County, 85 Mo. 645, State ex rel. Linn County v. Adams, 72 S.W. 655, 172 Mo. 1.

The existing laws do not prohibit the committee people from holding public office or jobs. The Constitution of Missouri has only one provision as to holding two offices and that is in Article III, Section 12:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative."

As a committeeman serves without compensation, the position is not a lucrative one, so this constitutional provision has no effect on your question.

The statutes are mute on the question of holding of two offices. The Common Law which is followed in Missouri in this situation limits the number of offices one can hold, only to those that are compatible and consistent; this is the holding in State ex rel. Walker v. Bus, 135 Mo. 325. In an opinion of this office to Mr. Andrew J. Higgins, under date of October 30, 1952, it was held that the office of a party central committeeman is not incompatible with the same individual holding county or municipal office, unless specifically prohibited by statute or the Constitution of Missouri.

The effect of a statutory enactment would reach the result desired; it would not require a constitutional amendment.

The Supreme Court of Missouri held in Noonan v. Walsh, 273 SW2d 195, that as a committeeman is charged with performing certain functions of government he is therefore a public officer. This satisfies the requirement that taxes "may be levied and collected for public purposes only," in Article X, Section 3 of the Missouri Constitution, as it makes party committeemen public officers. Therefore all that would be needed to compensate these committee people would be a statute passed setting out their compensation.

Mr. Sidney B. McClanahan

It would not require a constitutional amendment but only a statutory enactment to prohibit committee people from holding other public office or public jobs. This has been a principle long established in Missouri. In State ex rel. Wingate v. Woodson, 41 Mo. 227, the Supreme Court held that the State's power to declare in its Constitution, or by legislative enactment what shall constitute the test of eligibility to office is unquestionable. And in 1896, the Court held in State ex rel. Walker v. Bus, supra, that where the holding of two offices by the same person at the same time is forbidden by the Constitution or a statute, the effect is the same as in a case of holding incompatible offices at common law.

Therefore, it is my belief that under the existing laws of Missouri, the legislature can neither pay compensation to, nor prohibit committee people from holding other public office. To accomplish these ends, it would take the passage of a statute setting out the compensation and the prohibition. It would not be necessary to have a constitutional amendment to effect either proposition.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JDF:jh

June 21, 1962



Mr. George H. Morgan
Attorney at Law
Suite 207
7546 Troost
Kansas City 31, Missouri

Dear Mr. Morgan:

We have received your letter of June 12, 1962, in which you request an opinion concerning several questions on the authority of a school district to spend moneys in connection with a law suit against a classroom teacher and a high school principal for injuries to a student allegedly sustained as a result of corporal punishment.

We are enclosing for your information a copy of an opinion of this office issued June 14, 1955, to Honorable John S. Stevens, Assistant Prosecuting Attorney, St. Louis County, Clayton 5, Missouri, which deals with the right of a teacher to inflict corporal punishment upon a pupil.

With respect to the specific questions you have asked, there are certain general principles of law which are applicable and controlling in this situation.

Section 165.110, RSMo 1959, states:

"All school moneys received by a school district shall be dispersed only for the purposes for which they were levied, collected, or received. * * *"

9 A.L.R. 911 states as follows:

"The general rule in this country is that a school district, municipal corporation, or school board is not, in

June 21, 1962

the absence of a statute imposing it, subject to liability for injuries to pupils of public schools suffered in connection with their attendance thereat, since such district, corporation, or board, in maintaining schools, acts as an agent of the state, and performs a purely public or governmental duty, imposed upon it by law for the benefit of the public, and for the performance of which it receives no profit or advantage."

This general rule as expressed in 9 A.L.R. 911 is the law in Missouri as shown by Cochran v. Wilson, 287 Mo. 210, 229 S.W. 1050, and other Missouri cases cited in 160 A.L.R. 7, p. 40.

The annotation in 9 A.L.R., at page 920, further holds that the doctrine of respondeat superior has no application to the relation existing between a board of education and its employees. Because of these general rules which are the law in Missouri, as expressed in the authorities cited, the doctrine of respondeat superior does not apply and the school district is not liable for injuries to pupils suffered in connection with their attendance in school. Since there is no liability on the part of the school district and a school district may disperse funds only for lawful purposes, the school district has no authority to expend public funds to employ attorneys to defend individual teachers or principals who have been sued; and the school district has no authority to expend the public funds in payment of damages or in settlement of such a law suit.

I trust that this letter and the authorities cited will sufficiently answer your questions so as to obviate the necessity of rendering a formal opinion on your questions. We are always happy to be of service wherever possible.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WWW:gm

cc: State Department of Education
Enclosure

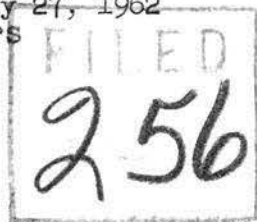
LEGISLATIVE DISTRICT COMMITTEE:

CONGRESSIONAL DISTRICT COMMITTEE:

(1) The committeemen and committeewomen of the several townships and of Ward 21 which are included in whole or in part in a legislative district of Clay County compose the legislative district committee for such legislative district. (2) There is no requirement that either the chairman or vice-chairman of a legislative district committee reside within the legislative district for which he or she is chairman or vice-chairman. (3) The chairman and vice-chairman of the county committee, the chairman and vice-chairman of each of the three legislative districts into which Clay County has been divided and the committeeman and committeewoman elected in the 21st Ward of Kansas City, constituting a part of Clay County, are, by virtue of

Honorable William Baxter Waters
State Senator, 17th District
First National Bank Building
Liberty, Missouri

July 27, 1962



their election as such, members of the Sixth Congressional District Committee.

Opinion No. 256

Dear Mr. Waters:

You have requested the opinion of this office as follows:

"As a result of the 1960 decennial census, Clay County became entitled to three members in the House of Representatives of the Missouri General Assembly. Pursuant to statute, the Clay County Court has officially established said three legislative districts and they are now in existence.

"This fact has had a bearing on the number of members to which Clay County is entitled on the Sixth Congressional Political Committee. It is with reference to this membership that I should like to submit the following questions to your office and request an official opinion therefor.

"1. How are the respective chairmen and vice-chairmen of the legislative district committee, as provided for in paragraph 1 of Section 120.810 VAMS, selected?

"2. What are the qualifications for said chairman and vice-chairman, that is, must they be members of the overall county committee?

"3. If they legally must be members of the county committee, what method of selection is to be followed if there be not a sufficient

Honorable William Baxter Waters

number of the members of the county committee residing in said legislative district so as to provide a chairman and vice-chairman?

"4. Clay County includes three legislative districts and a part of Kansas City located therein. With Clay County being a part of the Sixth Congressional District, how many members is said county entitled to have on said Congressional Political Committee under the provisions of said paragraph 4 of Section 120.810 VAMS?

Section 120.810, RSMo 1959, provides for a legislative district committee in all counties having more than one legislative district. In those counties entitled to only one representative, no provision is made for a legislative district committee, for the obvious reason that such county has no legislative district as such. The only provisions in our constitution and statutes for districts, in connection with representatives in the Missouri Legislature, concern counties entitled to more than one representative. In such situation, the county is required to be divided into districts. Article III, Sections 2, 7, and 9, Constitution of Missouri and Sections 22.040 and 22.050, RSMo 1959. There is no provision for districting the entire House of Representatives comparable to that with respect to State Senators. As to the latter, senatorial districts as such are created and exist even when the boundaries thereof are coextensive with the boundaries of a single county. Article III, Sections 5 and 7, Constitution of Missouri. It is for such reason that paragraph 3 of Section 120.810 makes no reference to representative districts coextensive with a single county, while providing for congressional, senatorial and judicial districts coextensive with a single county.

In determining the method of selection and the qualifications of the respective chairman and vice-chairman for each of the legislative districts in Clay County, Section 120.810 must be read together with Section 120.800, RSMo 1959. Originally both sections were a part of a single act enacted in 1923. Section 120.800 was amended in 1949 (H.B. 2063) to provide that the county chairman and vice chairman shall be members of the congressional committee, and Section 120.810 was amended in 1953 to read in its present form. (Laws 1953, p. 734.)

Honorable William Baxter Waters

We note that Section 120.800 provides that the county committee shall be composed of the committeemen and committee-women elected in the several townships, or voting districts, at the August primary next preceding and shall meet at the county seat on the third Tuesday in August of the year in which the primary election is held, and organize by the election of one of its members as chairman and one of its members as vice-chairman, one of whom shall be a woman. Provision is also made therein for the election of a secretary and a treasurer, who may or may not be members of the committee.

After the county committee has completed its organization as aforesaid, then under the provisions of Section 120.810, in counties such as Clay County, an election is held by the members of the legislative district committee "at the same time" (i.e., the third Tuesday in August) for the selection of a chairman and a vice-chairman for each legislative district. Although the statute does not spell out in so many words how such legislative committee shall be constituted, the clear import of the statutes relating to the various party committees is that each such legislative district shall be composed of the committeemen and committeewomen elected in the several townships and wards included in whole or in part in such district. It is of course possible that one or more of such committeemen and committeewomen will not be a resident of a legislative district, and that the same committeeman and committeewoman may be members of two or more legislative districts. However, such fact has no bearing upon the membership of such committeeman and committee-woman in the legislative district committees for all legislative districts of which their township or ward is a part.

It follows from the foregoing that each legislative district committee is, in effect, a subcommittee of the county committee, such subcommittee consisting of all committeemen and committee-women elected in townships and wards included in whole or in part in the legislative district. Each legislative district committee, at the time specified, is required to elect from its membership a chairman and a vice-chairman, one of whom must be a woman, for such legislative district. The statute does not prescribe residence in the legislative district as a qualification for the office of chairman and vice-chairman. All that is necessary is that such officers be members of the legislative district committee and that one of them must be a woman. The

Honorable William Baxter Waters

fact that the statute expressly provides that the secretary and treasurer need not be members of the committee further evidences the legislative intent that the chairman and vice-chairman must be members thereof.

Hence, in answer to your first three questions, we are of the opinion that the chairman and vice-chairman for each of the three legislative districts in Clay County are elected immediately following the organization of the county central committee by those members of the county committee who are committeemen and committeewomen from the townships and Ward 21 composing in whole or in part each such legislative district, that said chairman and vice-chairman must be members of said legislative district committee but need not reside in said district, and that one of said officers must be a woman.

Your final question relates to the number of members to which Clay County is entitled on the congressional committee for the Sixth Congressional District. Under the provisions of both Paragraph 2 of Section 120.810 and Section 120.800, the county chairman and vice-chairman are, by virtue of his and her election as such, members of the party congressional committee. In addition, Paragraph 2 of Section 120.810, provides that where a county forming a part of a congressional district has more than one representative district, then the chairman and vice-chairman of each of the legislative districts in said county shall be a member of the congressional district committee. Paragraph 4 of Section 120.810, to the extent here relevant, provides that the congressional district committee of a district which shall be composed in part of a part of a city shall include as members thereof the ward committeeman and committeewoman for such wards included in whole or in part in such part of the city forming a part of the district. You have informed us that Ward 21 of Kansas City, located in Clay County, constitutes a part of the Sixth Congressional District. Therefore, under the express provisions of said Paragraph 4, the committeeman and committeewoman from Ward 21 of Kansas City are required to be included as members of the Sixth Congressional District committee in addition to the county and legislative district chairmen and vice-chairmen.

CONCLUSION

It is the opinion of this office: (1) The committeemen and committeewomen of the several townships and of Ward 21 which are included in whole or in part in a legislative district

Honorable William Baxter Waters

of Clay County compose the legislative district committee for such legislative district. (2) Immediately following the organization of the county committee, the members of each legislative district in Clay County shall elect one of its members as chairman and one of its members as vice-chairman, one of whom must be a woman. There is no requirement that either the chairman or vice-chairman of a legislative district committee reside within the legislative district for which he or she is chairman or vice-chairman. (3) The chairman and vice-chairman of the county committee, the chairman and vice-chairman of each of the three legislative districts into which Clay County has been divided and the committeeman and committeewoman elected in the 21st Ward of Kansas City, constituting a part of Clay County, are, by virtue of their election as such, members of the Sixth Congressional District Committee.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:gm

INSURANCE:

Articles of Incorporation of
Midwest National Life Insurance Company

June 26, 1962



Honorable Jack L. Clay
Superintendent of the
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of June 25, 1962, with which you submitted to this office an executed copy of Declaration of Intention of original incorporators of the proposed Midwest National Life Insurance Company, which Declaration of Intention also included a copy of the articles of incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959. Also forwarded with your formal request for an opinion concerning the documents heretofore referred to was proof of publication of same as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Sections 376.010 to 376.670, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO'N:AT

MOTOR VEHICLES:
HIGHWAY DEPARTMENT:
STATE HIGHWAY DEPARTMENT:
AGRICULTURAL IMPLEMENTS:
ROAD MACHINERY:
ROAD MATERIALS:
PERMIT FOR OPERATION OF MOTOR
VEHICLES TEMPORARILY TRANS-
PORTING:

A hauler regularly transporting motor vehicles carrying agricultural implements or road making machinery or road materials must obtain permit if dimensions exceed statutory authorization. No permit required for such hauler not regularly engaged in such transporting.

July 11, 1962

OPINION NO. 262

Honorable Robert L. Hyder
Chief Counsel
State Highway Commission
Jefferson City, Missouri



Dear Mr. Hyder:

This is in answer to your letter of recent date in which you ask for a formal opinion as to the necessity for a permit for the operation of motor vehicles transporting agricultural implements or road machinery or road materials, where the dimensions of such vehicles, including loads, exceed the dimensions authorized by Section 304.170, RSMo 1959.

Section 304.170 provides as follows:

- "1. No vehicle operated upon the highways of this state shall have a width, including load, in excess of ninety-six inches, except clearance lights, rear view mirrors or other accessories required by federal, state or city law or regulation.
2. No vehicle operated upon the highways of this state shall have a height, including load, in excess of twelve and one-half feet.
3. No single motor vehicle operated upon the highways of this state shall have a length, including load, in excess of thirty-five feet.
4. No bus or trackless trolley coach operated upon the highways of this state shall have a length in excess of forty feet.

Honorable Robert L. Hyder

5. No combination of vehicles operated upon the highways of this state shall have an overall length, unladen or with load, in excess of fifty feet.

6. These restrictions shall not apply to agricultural implements operating occasionally on the highways for short distances, or to vehicles temporarily transporting agricultural implements or road making machinery, or road materials, or towing for repair purposes vehicles that have become disabled upon the highways."

Section 304.200, the authority for the issuance of permits by the State Highway Department for vehicles exceeding the dimensions set out in Section 304.170, provides in part as follows:

"1. The chief engineer of the state highway department, whenever in his opinion the public safety or public interest so justifies, may issue special permits for vehicles exceeding the limitations on width, length, height and weight herein specified. Such permits shall be issued only for a single trip or for a definite period, not beyond the date of expiration of the vehicle registration and shall designate the highways and bridges which may be used under the authority of such permit."

From the plain, clear unequivocal language found in Section 304.170 (6) there is no restriction upon the vehicles therein enumerated and such vehicles do not require a permit when such vehicles exceed the dimensions set out in Section 304.170, since such restrictions simply do not apply to the vehicles set out in Section 304.170 (6). However, the real problem in this connection arises in determining what vehicles do come within the exception set out in Section 304.170 (6).

Honorable Robert L. Hyder

In the case of Park Transportation Company v. Missouri State Highway Commission et al, 60 SW2d 388, the Supreme Court of Missouri en banc decided a case in which a suit was brought by a "contract hauler" against the State Highway Commission asking for an injunction against such Commission bottomed upon the allegation that the State Highway Commission had promulgated a rule which was unauthorized under the provisions of Section 304.170 (6). The allegation was that the State Highway Commission had notified the Company that it would not issue a permit for such Company to haul overlength or overwidth loads of road building machinery or materials except from a point where the road building machinery or material had been transported by rail to a place as close as possible to the actual point of road construction. The contract hauler further alleged that such hauler was in the business of hauling road material by truck on public highways over irregular routes in the State and occasionally overlength loads were required to be transported. The Supreme Court affirmed the trial court's denial of the issuance of an injunction in this law suit and held that the contract hauler in this case did not show that such hauler came within the exemptions of Section 304.170 (6), and further held that the phrase "temporarily transporting" referred to the use made of the highway and not temporary necessity of a hauler in being required to make a trip with a load in excess of the length authorized by law.

The Court said, l.c. 392:

" * * * The expression 'temporarily transporting' as used in the statute is a definition, a term of legal signification, to be interpreted as a matter of law. The duty is imposed by the statute upon a fact-finding agency to determine when the facts of a given situation meet the legal definition and authorize the transportation. Appellant seems to hold the view that its own temporary necessity is the same thing as temporarily transporting, notwithstanding they are distinctly dif-

Honorable Robert L. Hyder

ferent. It is quite apparent that the latter expression refers to the use made of the highways, and implies that the use in any particular instance is of short duration and frequency as compared with the ordinary use of the highways by motortrucks, with a corresponding limitation of interference with other traffic and of wear and strain on the highways. * * * "

It appears that the Supreme Court in so holding made a determination that to come within the exemption of Section 304.170 (6), a hauler must not be regularly engaged in the business of transporting agricultural implements or road making machinery or road materials, but to come with the exemption, a hauler must be one who makes only an infrequent trip transporting such machinery or materials and who is not regularly engaged in such business.

If a hauler is regularly engaged in transporting agricultural machinery, road building machinery, or materials, he must obtain a special permit under provisions of Section 304.200, if he wishes to transport loads exceeding the dimensions authorized by Section 304.170.

The opinion of the Attorney General issued under date of July 31, 1947, to Colonel Hugh H. Waggoner, the conclusion of which held that persons operating motor vehicles on the highways of this state, the dimensions of which in width, height or length, exceed those prescribed by statute must obtain a special permit from the chief engineer of the State Highway Department, even though such operation is for the purpose of temporarily transporting agricultural implements, or road making machinery or road materials is hereby withdrawn.

CONCLUSION

It is the opinion of this office that a hauler regularly transporting upon the highways of this State in motor vehicles, agricultural implements or road making machinery or road materials, must obtain permits from the chief engineer of the State Highway Department before being authorized to

Honorable Robert L. Hyder

transport over the highways of this State, a motor vehicle including load, which exceeds the dimensions set out in Section 304.170. It is further the opinion of this office that a permit is not required to authorize a hauler not regularly engaged in the business of transporting agricultural implements or road making machinery or road materials to make an infrequent trip transporting such machinery or materials in a vehicle, including load which exceeds the dimensions authorized by Section 304.170.

This opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CBB:jh

September 17, 1962

Opinion No. 263 answered by
letter. (Denman)

Honorable John Hosmer
Prosecuting Attorney
Webster County
Marshfield, Missouri



Dear Mr. Hosmer:

This letter is in response to your letter to this office of June 24, 1962, requesting an opinion upon the following questions submitted in an enclosed letter to you from Glenn H. Ventling, Collector of Revenue, Webster County:

"I have a case of a man purchasing 40 acres at a tax sale in 1946. The tax certificate was issued in his name only. He is now deceased, and his widow has the tax certificate, but the deed was never issued. They have been paying the taxes all this time, but are 5 years delinquent each year.

Question:

1. Can I issue a Collectors Deed on the tax certificate which they have?
2. If so, in whose name would the title be?
3. If not, whose property is it now?
4. What is the tax status, can it be sold for taxes?"

Honorable John Hosmer

In an opinion of this office issued on June 22, 1949, to the Honorable Bryan Tout, County Audit Supervisor, Office of the State Auditor, a copy of which is enclosed herein, it was concluded that a purchaser of property at a delinquent tax sale loses all right and title to the property if such purchaser or his heirs and assigns does not cause a deed to be executed and placed on record in the proper county within four (4) years from the date of sale as provided in Section 140.110, RSMo 1959.

We have researched the more recent cases and conclude the law as set out in the enclosed opinion has not been changed. See *Journey v. Miller* (1952) Mo., 250 SW2d 164, wherein the Court after citing the statute in question stated, 1.c. 165:

"The apparent purpose of this statute is to require the holder of a certificate of purchase to obtain a deed within the specified period or lose his right to either a deed or reimbursement and thus settle the title, which otherwise remains indefinite within that period."

In answer to your specific questions, it is our opinion:

1. A collector's deed on the tax certificate may not be issued after four (4) years from the date of sale;
2. Not applicable by reason of our answer to question one;
3. We offer no opinion as to the ownership of the property as this question is not within the purview of the county collector's office;
4. Said property may be sold any time there are delinquent taxes as provided in Section 140.150 et seq.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JHD:JH

July 5, 1962



Honorable Stewart E. Tatum
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Mr. Tatum:

This is in answer to a letter from Ben F. Pyle, Assistant Prosecuting Attorney, dated June 27, 1962, in which an opinion is requested concerning the closing of a school in a common school district and the transportation of the pupils to another school.

We are enclosing a copy of an opinion of this office issued on October 12, 1943, to Honorable John H. Keith, Prosecuting Attorney of Iron County, Ironton, Missouri. This previous opinion sets out three different situations in which a school may be closed and the pupils transported.

One of these situations is under Section 10464, RSMo 1939, which is now Section 161.120, RSMo 1959, and this is the section to which you refer in your letter. This section is probably not applicable to your situation since it deals with a district which has an average daily attendance of less than fifteen pupils and in your letter the district involved has an average daily attendance in excess of twenty pupils.

Another situation is under Section 10324, RSMo 1939, which is now Section 165.013, RSMo 1959. From the facts stated in your letter, we do not know whether this section will apply to your situation since it deals with districts having fewer than twenty-five children and although you state that the district concerned has in excess of twenty pupils, we do not know whether it has fewer than twenty-five.

Honorable Stewart E. Tatum -2-

July 5, 1962

The other situation is under Section 10457, RSMo 1939, which is now Section 161.100, RSMo 1959. The application of this section will depend upon the facts of the situation in your local districts.

In your letter you want to know whether an opinion will be granted by this office. Strictly speaking, this office is required by Section 27.040, RSMo 1959, to render opinions to the prosecuting attorneys only upon questions of law relative to their respective offices or the discharge of their duties, and we doubt that it is a part of the official duties of a prosecuting attorney to advise a member of the board of directors of a common school district. However, we are always happy to be of assistance in any way possible and we hope that this copy of the previous opinion of this office will be helpful to both you and Mr. Osborne. We trust that an examination of the facts of your situation in the light of these various sections of the law will give you the answer you need.

If we can be of any further assistance, please feel free to contact us again in this matter.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WWW:gm
Enclosure

CONSTITUTIONAL AMENDMENT:
ST. LOUIS BOROUGH PLAN:
BOROUGH PLAN:

Ballot title for constitutional amendment by initiative petition relating to the so-called Borough Plan uniting the City of St. Louis and St. Louis County to be submitted to the voters on November 6, 1962.

OPINION NO. 266

July 5, 1962

Honorable Warren E. Hearnes
Secretary of State
Capitol Building
Jefferson City, Missouri



Dear Mr. Hearnes:

With respect to your request dated June 29, 1962, for an appropriate ballot title of the initiative petition for constitutional amendment, commonly known as the "Borough Plan", we wish to advise you that this office has concluded that Section 125.030 is the applicable section of the statutes.

A ballot title has been prepared and the same is as follows:

"Uniting St. Louis City, St. Louis County, municipalities and districts therein, except school districts, under new government; providing charter-making power, initial charter; related provisions."

Yours very truly,

JGS:ml

THOMAS F. EAGLETON
Attorney General

OPINION REQUEST NO. 267 answered by letter
(Kingsland)

July 6, 1962



Honorable George H. Morgan,
Representative
8th District Jackson County,
7546 Troost,
Kansas City 31, Missouri

Dear Mr. Morgan:

This is in answer to your letter dated June 29, 1962 requesting our opinion as to whether a man who pleaded guilty in Circuit Court of Jackson County in 1945 to the charge of leaving the scene of an accident, and pursuant to this conviction was fined \$100, can now hold a county office.

For the purpose of this opinion we shall assume that the offense to which the person pleaded guilty was a felony. We shall further assume that the county office aspired to is an office of honor, profit and trust.

Initially, it is to be noted there are no general disenfranchisement statutes for felony convictions. That is to say, a felony conviction does not automatically forfeit the right of the person so convicted to hold office. It is only for specified convictions that Missouri statutes forfeit this privilege. Sections 557.490, 558.130, 559.470, 560.610, 561.340 and 564.710, RSMo 1959.

The conviction in question occurred in 1945. At that time the felony "Leaving the Scene of an Accident" appeared in Chapter 45, RSMo 1939, entitled "Motor Vehicles". This chapter contained no disenfranchisement statute for any convictions for felonies under the chapter. Therefore, at the time this plea of guilty was entered in 1945 there was no forfeiture of the right to hold office connected with it. However, the subsequent legislative history of this felony shows that in the statutory revision of 1949 this section was repealed and reenacted as part of Chapter 564, RSMo 1949,

Honorable George H. Morgan

entitled "Offenses against Public Health and Safety." This revision statute was effected by House Bill 2154. The wording of the statute was not changed. Chapter 564, RSMo 1959, contains a general disenfranchisement section which reads as follows (Section 564.710):

"Every person who shall be convicted of any felony punishable under any of the provisions of this chapter, shall be thereby disqualified from holding any office of honor, profit or trust, or voting at any election within this state."

This disenfranchisement statute was enacted in 1879 and has remained unchanged through the various revisions to date. In the 1949 revision, when the felony of "Leaving the Scene of an Accident" was incorporated in Chapter 564, the Legislature evidenced no intent, generally or specifically, that the disabling section (564.710, *supra*) was to apply retrospectively to this newly included felony.

Section 1.120, RSMo 1949, provided:

"The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."

In the interpretation of this section Missouri courts have consistently held that absent specific legislative intent evidenced in the reenactment, the statute is continued with the same force and meaning as originally enacted. In the case of *Kern vs. Supreme Council American Legion of Honor*, 67 SW 253, 1. c. 255, the Court stated:

"In other words all laws must be prescribed by law making power and it is not within the power of a later assembly to declare that a prior assembly meant something it did not say in the laws enacted by it. * * *"

Honorable George H. Morgan

See also the recent case of Kansas City vs. Travelers Insurance Company, 284 SW 2d 874, 878[4] where the Kansas City Court of Appeals stated:

"Furthermore, a section or an Act should not be construed or considered as a new section or a new Act by reason of it being inserted in the Revised Statutes. It is simply continued with the same force and meaning as originally enacted. (Citing cases)."

In the case of Hatcher vs. Hall, 292 SW 2d 619, 623, the Springfield Court of Appeals noted:

"Recognizing the well-established principle that inclusion of an existing law in a statutory revision operates only as a continuance of its existence and not as a new enactment and that such law must be construed with reference to other statutes as of the date of its original enactment, * * *."

Certainly when this conviction was effected in 1945 there was no disability against holding public office enacted with it. It can be readily seen that "force and meaning of the statute" would be enlarged if it were to be construed that the subsequent insertion of a statute in a chapter containing a general disenfranchisement section brought it into the purview of the latter disabling section. It would also violate the principle of law noted above, that the statute is to be construed with reference to other statutes as of the date of its original enactment. There is no language in Section 564.710 giving any indication that the Legislature intended this section to operate retrospectively to include the felony "Leaving the Scene of an Accident."

It is, therefore, the opinion of this office that a person convicted in 1945 of the felony of "Leaving the Scene of an Accident" can qualify for and hold a county office.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

RDK:MW

JUVENILES: Juvenile court cannot commit boy over 17 to
JUVENILE COURTS: State Training School even if child is under
TRAINING SCHOOLS: jurisdiction of court. Juvenile court may
BOARD OF TRAINING SCHOOLS: exercise jurisdiction over child for viola-
MINORS: tion of law when child has been paroled by
CHILDREN: State Board of Training Schools. After
PARENTAL RIGHTS: filing a petition for termination of parental
SERVICE: rights, parents must be notified of right to
counsel, and counsel appointed if parents
cannot employ same. Parents in federal prisons outside Missouri sum-
moned by mail or personal service as provided in Sec. 506.160.

OPINION NO. 270

November 13, 1962

Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County
Mexico, Missouri

270

Dear Mr. Levvis:

This is in answer to your letter of recent date requesting an opinion from this office in regard to three specific factual situations, the first of which, with question in reference thereto, reads as follows:

"A boy 16 years of age committed the offense of burglary. He was made a ward of the Audrain County Juvenile Court and placed under the supervision of the juvenile officer. That status continued until a short time after the boy's seventeenth birthday, when he participated in another burglary. Does the Juvenile Court of said county have authority to commit this minor to the State Board of Training Schools?"

In answering your foregoing inquiry, your attention is directed to Section 211.191 of Chapter 211, RSMo 1959, which pertains to juvenile courts. Said section states as follows:

"Nothing in sections 211.011 to 211.431 shall be construed to repeal any part of the law relating to the state training school for girls or the state training school for boys; and in all commitments to either of these institutions the law in reference to them shall govern."

Honorable Lon J. Levvis

Chapter 219, RSMo 1959, deals with the law relating to the Missouri State Training School for Boys and Section 219.160 pertains to the statutory provisions thereof governing the commitments thereto. Said section reads as follows:

"Any boy over the age of twelve years and under the age of seventeen years and any girl over the age of twelve years and under the age of twenty-one years who has been convicted of a crime or who is found by the juvenile or circuit court to be in need of training school education and discipline may be committed to the state board of training schools. Except where a child who is convicted of a crime and sentenced for a period of time which will not expire until after his twenty-first birthday, all commitments to the board shall be made for an indeterminate period of time."

As the quoted section restricts the commitment of any boy to the State Board of Training Schools to boys over the age of twelve and under the age of seventeen years, it is our view that, as the minor in question is seventeen years old, he cannot now be committed to the State Board of Training Schools by the juvenile court under our present laws.

Your second factual situation and inquiry in reference thereto reads as follows:

"A boy 14 years of age was adjudged in the Juvenile Court of Audrain County to be a delinquent minor and was committed to the State Board of Training Schools, which assigned him to the Boonville institution. About one year later he was released, on parole, from that institution. While he was 16 years of age and still on said parole he was arrested on charges of having possession of alcoholic beverages,

Honorable Lon J. Levvis

driving a motor vehicle without having an operator's license, and leaving the place of an accident, the latter being a felony. May said Juvenile Court, while said minor is still on said parole from Boonville, entertain a petition of the Juvenile Officer charging said minor with said recent offenses, and commit him again to said Board or order him tried under general law, or does exclusive jurisdiction of said minor remain with the Board of Training Schools?"

Note in this regard Section 211.021, which states, in part, as follows:

"As used in sections 211.011 to 211.431, unless the context clearly requires otherwise:

* * * *

"(2) 'Child' means a person under seventeen years of age; * * *."

And, further, note Section 211.041, which states as follows:

"When jurisdiction over the person of a child has been acquired by the juvenile court under the provisions of sections 211.011 to 211.431 in proceedings coming within the applicable provisions of section 211.031, the jurisdiction of the child may be retained for the purpose of sections 211.011 to 211.431 until he has attained the age of twenty-one years, except in cases where he is committed to and received by the state board of training schools."

In an opinion of this office under date of April 20, 1959, issued to W. E. Sears, Director of Training Schools, we concluded, from a reading of Chapters 211 and 219, RSMo,

Honorable Lon J. Levvis

and specifically Sections 211.041, 211.191, 211.251 and 219.220, that the juvenile court loses jurisdiction of a child when such child is committed to and received by the State Board of Training Schools. (A copy of said opinion is enclosed herewith.)

However, the loss of jurisdiction which results from committing the child to the State Board of Training Schools has reference only to the proceedings in which the jurisdiction was initially obtained by the committing juvenile court. The obvious purpose of Section 211.041 was to prevent the juvenile court from retaining jurisdiction over the person of the child in the original proceedings after the child has been committed to and received by the State Board of Training Schools. It does not purport to and may not reasonably be construed to grant to the State Board of Training Schools exclusive jurisdiction over the person of the child for all purposes, nor to prevent the juvenile court from acquiring (as distinguished from retaining) jurisdiction over the person of the child in other proceedings coming within the applicable provisions of Sections 211.021 and 211.031, as the result of an alleged violation of law subsequent to the original commitment.

Under the facts as submitted, therefore, assuming that the boy in question is within Audrain County pursuant to the requirements of Section 211.031, supra, it is our view that the fact that the child is on parole from the State Board of Training Schools does not preclude the juvenile court of Audrain County from exercising jurisdiction over the child by reason of his alleged subsequent acts.

Your concluding factual situation pertains to the termination of parental rights, the procedure and grounds for which are contained in Sections 211.440 to 211.511, RSMo 1959, inclusive. Said facts are as follows:

"Both of the parents of three small children in Audrain County have been convicted of felonies and are confined in federal prisons outside Missouri. The children have been made wards of the State of Missouri, and the Juvenile

Honorable Lon J. Levvis

Officer wants to ask the Juvenile Court of said county to terminate the parental rights of said parents so that said children may be offered for adoption."

Only two questions are asked in reference to the above, the first of which is: "What, if any, provision is there in law for providing said parents with legal counsel in an action to terminate their parental rights?"

Section 211.471 states, in part:

"As soon as practicable after the filing of a petition and prior to the hearing, the parent, guardian, or custodian shall be notified of their right to have counsel, and if they request counsel and are financially unable to employ counsel, counsel shall be appointed by the court."

It is our view that this section plainly makes it mandatory that the parents in this case should be notified of their right to have counsel as soon as practicable after the filing of the petition for termination and prior to the hearing, and that if they request counsel and are financially unable to employ counsel, counsel must be appointed by the court.

Your concluding question is: "How may said parents be given lawful notice of such proceedings?" Section 211.461 states as follows:

"1. The termination of parental rights shall be made only after a hearing before the juvenile court. A summons shall be issued by the judge or the clerk of the court requiring the person, agency or organization having custody or control of the child to appear with the child at the place and time stated in the summons. Persons who shall be summoned and receive a copy of the petition shall also include the parents of the child, * * * and the state division of welfare, agency or organization or person standing in loco parentis having an interest in the welfare of the child. * * *

Honorable Lon J. Levvis

"2. Service of summons shall be made as in other civil cases in the manner prescribed in section 506.150, RSMo, provided however, if service cannot be made as prescribed in section 506.150, RSMo, then the service shall be made by mail or publication as provided in section 506.160, RSMo.

"3. The parent or parents may waive appearance or service of summons in writing before the court."

After considering this section and those sections referred to therein, it is our view that, absent a waiver as provided in subdivision 3, the parents must be summoned and must be served with a copy of the petition for termination of parental rights and that this service of summons and petition, along with the notice of the parents' right to have counsel, as considered previously, should be made by mail or by personal service out of the state as provided for in Section 506.160, RSMo 1959, as under the facts presented herein the parents are outside the confines of the State of Missouri but their address is known.

Conclusion

(1) The juvenile court has no authority to commit to the State Board of Training Schools a boy who violates the law after attaining the age of 17 years, even though the boy was then under the jurisdiction of the juvenile court.

(2) The juvenile court is not precluded from exercising jurisdiction over the person of a child by reason of an alleged violation of law subsequent to his commitment to and parole from the State Board of Training Schools.

(3) As soon as practicable after the filing of a petition for termination of parental rights and prior to the hearing, the parents must be notified of their right to have counsel, and if they request counsel and are financially unable to employ counsel, counsel must be appointed by the court.

Honorable Lon J. Levvis

(4) Parents confined in federal prisons outside the State of Missouri should be summoned and served with a copy of the petition for termination of their parental rights by mail or by personal service outside the state as provided for in Section 506.160, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul A. Slicer, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PAS:lt;ml

GUARDIANS: (1) Upon the death, removal or resignation of a
INCOMPETENTS: guardian of an incompetent it is not necessary to
PROBATE COURTS: have a second application and a rehearing on the
question of competency in order to appoint a suc-
cessor guardian. (2) Confinement in a state mental
hospital does not constitute an adjudication of
incompetency which will authorize the appointment
of a guardian.

Opinion No. 271

October 18, 1962

Honorable Larry M. Woods
Prosecuting Attorney
Boone County
Columbia, Missouri

271

Dear Mr. Woods:

This is in response to your letter to this office of July
3, 1962, requesting our opinion on the following matters:

"Reference is made to Section 475.115,
Revised Statutes of Missouri 1959. The
first portion of this section appears to
give the court authority to appoint a
successor guardian in the same manner as
in the case of a deceased executor or
administrator. There has been some con-
tention that the latter part of this
section requires a proceeding which would
include everything done originally, even
though the incompetent is still incompe-
tent so far as the record shows and all
that is actually needed is the appointment
of a guardian to succeed a deceased guard-
ian. My question is, is it necessary for
the court to hold a proceeding to include
everything which was originally done or
may the court simply appoint a successor
guardian without further proceedings?

"Also, the Superintendent of State Hos-
pital Number 1 requests appointment of
a guardian for a patient who has been an
inmate for more than fifty years. The
guardian is to make application for wel-
fare payments to apply on the expenses

Honorable Larry M. Woods

of nursing home care, where the patient is to be transferred. Reference is made to Section 208.180, in the latter part of Paragraph 1, as to waiver of expenses. My question is, may the court make such an appointment for such purpose directly upon the request of the Superintendent, or should there be a hearing, counsel appointed, and all other proceedings that are otherwise necessary?"

In answer to your first question, prior to 1955, a sanity hearing was initiated by filing a verified information in writing with the probate court. If satisfied there was good cause for the exercise of its jurisdiction, the court would cause the facts to be inquired into by a jury, or, if no demand for a jury was made, by the court sitting as a jury. Section 458.020 RSMo 1949. If an inquiry or hearing was held, written notification to the alleged incompetent was required, and if no licensed attorney appeared the court was required to appoint one to safeguard the rights of the alleged incompetent. Section 458.060 RSMo 1949. If the subject of the inquiry was found to be incompetent, a guardian was then appointed. Section 458.070 RSMo 1949. Under these statutes, the adjudication of incompetency and the appointment of a guardian were entirely separate acts. If the appointment of a successor guardian became necessary, the court was authorized to do so by Section 458.520 RSMo 1949, which read as follows:

"Whenever any such guardian shall die, resign, or be removed from his trust, the probate courts shall have the same authority as they have in like cases over executors and administrators and their sureties."

In such cases, the probate court would appoint a successor guardian in ex parte proceedings without the necessity of any of the procedure required for an adjudication of incompetency. In *Re Hoerman's Estate*, (1952) Mo., 247 S.W.2d 762; *State ex rel. and to the use of Beardon v. American Surety Co. of New York*, (1937) 231 Mo.App. 491, 104 S.W.2d 755. These cases did not hold directly that the adjudication of incompetency and the appointment of a guardian were separate and distinct acts, nor that a successor guardian could be appointed in ex parte proceedings without the necessity of further action by the court. We can find no Missouri cases directly so holding. However, this procedure was followed

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in these cases and no question was raised as to the propriety of the courts' action.

This procedure was changed slightly by the enactment of the new Probate Code in 1955. A sanity hearing is now initiated by an application for guardianship. Section 475.060 RSMo 1949. This application now must allege not only the statutory grounds necessary for an adjudication of incompetency (Subsection 9), but also certain information regarding the proposed guardian (Subsections 8, 10).

The requirements for a hearing on the question of competency, after due notice to the alleged incompetent, and the subsequent appointment of a guardian, if the subject of the inquiry is found to be incompetent, were not changed materially and are found in Sections 475.075 and 475.090 RSMo 1959. Section 458.520 RSMo 1949, now Section 475.115 RSMo 1959, regarding the appointment of a successor guardian, was changed very slightly, and the clause "and may appoint another guardian in the same manner and subject to the same requirements as are herein provided for an original appointment of a guardian" was added. These changes, purportedly were derived from the Model Probate Code, and Sections 475.060 and 475.115 are the same as Sections 204 and 217 of the Model Code.

The question is, does the addition of this clause in Section 475.115, taken together with the change embodied in Section 475.060, change the previous law and require another application, a hearing thereon after proper notice, and a readjudication of incompetency before the appointment of a successor guardian may be made.

It is our opinion it does not. The adjudication of incompetency and the appointment of a guardian are still separate acts. A petition must be filed alleging facts which, if true, require the appointment of a guardian. Section 475.060. After due notice a hearing is held at which the rights of the alleged incompetent are fully protected. Section 475.075. If the subject of the inquiry is found to be incompetent, then a guardian is appointed. This procedure is in essence no different from that followed before the adoption of the new Probate Code.

To find the meaning of a statute, it must be presumed that the Legislature intended a reasonable construction which will permit of beneficial results. *Darlington Lumber Co. v. Missouri Pacific R. Co.*, (1909) 216 Mo. 658, 116 S.W. 530; *Mummel v. Thomas*, (1944) Mo., 181 S.W.2d 168. Section 475.360 RSMo 1959 provides for an

Honorable Larry M. Woods

inquiry and hearing in the event of a recovery of competency of an individual previously adjudged to be incompetent. It would not be reasonable to believe the Legislature intended the amendment in Section 475.115 to require a readjudication of competency which was already fully covered by another statute. Construing Section 475.115 to require a new application, an additional notice and hearing, and a readjudication of incompetency for which no need is shown is neither reasonable nor beneficial. Such a construction would entail additional court costs to either the estate of the incompetent or to the county for no reason. It is possible that notice of a hearing and appearance before the court might also subject the incompetent to a severe emotional disturbance detrimental to his health.

The necessary qualifications for guardians are set out in Section 475.055 RSMo 1959. A more reasonable construction of the statute is that the clause "in the same manner and subject to the same requirements as are herein provided for an original appointment of a guardian," was added for clarification of the former statute and that such language simply refers to the requirements as to the qualifications of the guardian, and the fact that such appointment must be made by the court, by order, the same as required when an original appointment is made.

In answer to your second question, any person may file a petition for the appointment of himself or another qualified person as guardian of an alleged incompetent. Section 475.060 RSMo 1959. However, hospitalization of a mentally ill person, even as a result of a judicial proceeding, is not a determination of that person's incompetency. Missouri Practice, Volume V, Sections 1779 and 1882; *Murphy v. Murphy*, (1962) Mo., 358 S.W.2d 778. The state of mental incapacity required for admission to a state hospital is not necessarily the same as that required for an adjudication of incompetency. Sections 202.780(5), 202.797-1(2), 202.807-5, and 475.060(9) RSMo 1959. Therefore, the fact that the patient has been in a mental hospital for over fifty years does not vitiate the necessity of following the required statutory procedure for an adjudication of incompetency prior to the appointment of an original guardian.

In answering this question, we have assumed the patient was confined in the state hospital by a proceeding other than an incompetency hearing and no guardian was appointed for him at that time. If the patient had a guardian at one time, in accordance with our answer to your first question, the court may appoint a successor guardian with no further proceedings necessary.

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CONCLUSION

It is our opinion it is not necessary to have a second application and a rehearing of the question of competency in order for the probate court to appoint a successor guardian for an incompetent. However, confinement in a state mental hospital does not constitute an adjudication of incompetency for which a guardian may be appointed. If a guardian is sought for an inmate thereof, the court must follow the statutory procedure required for an original appointment of a guardian.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JHD:sr

PUBLIC IMPROVEMENTS:
GASOLINE TAX:
ORDINANCES:
CITIES, TOWNS AND VILLAGES:
STREETS:
HIGHWAYS:

City Councils of third class cities may delegate authority to their street committees to determine which streets are to be repaired with gas tax funds. Substantial public improvements can only be made through the enactment of city ordinances.

OPINION REQUEST NO. 280

November 13, 1962

Honorable John M. Dalton
Governor of Missouri
Executive Office,
Jefferson City, Missouri

280

Dear Governor Dalton:

Your recent request for an official opinion from this office is as follows:

"I would like to have your opinion on a question which has arisen pertaining to funds allocated to cities of this State under the gasoline tax sharing amendment that was recently adopted.

"In a city of the third class, must determination of the specific projects on which the funds are to be expended be made by the city council or can the council approve a delegation of authority to the street committee of the council to determine the streets on which the funds are to be expended and then expend from such funds? If such delegation is not permissible, must specific expenditures be approved by the entire council and mayor, and, if so, may such approval be by way of ordinance or resolution or by both such methods?"

Under the recently enacted gas tax amendment, Article IV, Section 30(a)(2), Missouri Constitution, 1945, certain cities in Missouri are now sharing in the net proceeds of the state gasoline tax. The cities sharing in this program are limited to spending these funds:

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"* * * solely for construction, reconstruction, maintenance, repair, policing, signing, lighting and cleaning roads and streets and for the payment of principal and interest on indebtedness incurred prior to the effective date of this section on account of road and street purposes,
* * *."

Although this constitutional amendment limits the purposes for which these funds may be spent, the manner in which gas tax revenues are to be expended is no different than the manner in which other funds of the city are to be spent for similar purposes.

In the case of Proper v. City of Independence, Mo. App., 328 S. W. 2d 55, the Kansas City Court of Appeals states, at pages 57 and 58:

"The general rule is that the authorization of a public improvement by the municipal authorities must be by an order in some form; and, when the power to make improvements is conferred in general terms, the municipal corporation may exercise the power only by a formal legislative action on the part of the city council, 63 C.J.S. Municipal Corporations §1104, p. 766; Austin Western Road Machinery Co. v. City of New Madrid, Mo. App., 185 S. W. 2d 850; City of Flordell Hills v. Hardekopf, Mo. App., 271 S. W. 2d 256. However, this rule does not prevent temporary or ordinary work and repair of streets being done without specific authority, and cases discussing such repairs are not authority for the question before us.

"The construction of this bridge was a substantial public improvement, not a mere repair or maintenance of a street.

"It is our conclusion that authorization for the construction of the bridge should have been by legislative action of the city council. (citing cases)." (Emphasis supplied).

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Thus, if a third class city is to spend gas tax moneys for substantial public improvements, it is required to exercise its power through formal legislative action. This legislative power cannot be delegated by a city council even to committees of itself or to subordinate public officials. State ex rel. Priest et al v. Gunn et al, Mo. Sup., 326 S. W. 2d 314; Auto-mobile Club of Missouri v. City of St. Louis, Mo. Sup., 334 S. W. 2d 355. This basic rule prohibiting the delegation of legislative power is modified in that "the municipal governing body can delegate to committees of that body or to subordinate municipal servants powers judicially labeled 'administrative', 'executive', 'ministerial', or 'quasi judicial'." Antieau, Municipal Corporation Law, Vol. 1, Section 518, pages 273, 274.

From the Proper case it would thus appear that repairs would be classified as ministerial acts. The authorization to determine which streets are to benefit from gas tax moneys, for these ordinary repairs, can be delegated to the street committees by city councils of third class cities. This delegated power, however, must be within certain reasonably adequate standards to guide the officials.

In Rhyne, Municipal Law, Section 4-10, page 74, it is stated:

"Although it is generally conceded that the state legislature may delegate to its municipalities any powers it deems wise and proper, as an historical exception to the rule against delegation of legislative power, the extent to which a municipality may in turn delegate power in the performance of its functions is controlled by the same principles which usually govern the delegation of powers by the state. Thus, it has been repeatedly held that a municipality may not delegate legislative or judicial power unless expressly authorized by the legislature. On the other hand, it is equally well recognized that a municipal governing body may delegate to subordinate officers or boards powers and functions which are ministerial or administrative, where there is a fixed and certain

Honorable John M. Dalton

standard or rule which leaves nothing to the judgment or discretion of the subordinate, or at most invests him with some reasonable discretion in administering the standard or rule." (Emphasis supplied).

For those expenditures which can only be made by formal legislative action, such legislative action must be by ordinances and not resolutions. City Trust Company vs. Crockett, 309 Mo. 683, 274 S. W. 802, 810. It is true that Section 78.190, RSMo 1959, V.A.M.S., refers to "every ordinance or resolution appropriating money or ordering any street improvement" and Section 77.280 refers to "any resolution or order of the council which calls for or contemplates the expenditure of the revenue of the city." However, any authorization for street improvements and expenditure of money must be " * * * adopted by the council and approved by the mayor with all the formalities required in the passage of ordinances." City of Springfield to the Use of McEvilly vs. Knott, 49 Mo. App. 612, 617. See also Baker Mfg. Company vs. City of Richmond, Mo. App., 198 S. W. 1128, which equated an "order" of the city council with an "ordinance" over which the mayor had veto power, and held the "order" void because not signed by the mayor or passed over his veto.

The Crockett case involved the question of whether an ordinance was needed subsequent to the passage of a resolution by the city council declaring that certain public improvements were necessary, and specifically held that an ordinance, and not a mere resolution, was required. The present day statutory provisions for the passage of a resolution by the city council of a third class city declaring certain public improvements to be necessary are found at Sections 88.497 through 88.663, RSMo 1959, V.A.M.S. The reference in these sections to the adoption of resolutions is merely to give interested property owners notice of proposed improvements so that they may register any objections with the city council. Once these resolutions are passed, the city council still must exercise its legislative power through an ordinance to effectuate street improvements. The expenditure of gas tax money is like any other expenditure and must be authorized by an ordinance subject to the veto power of the mayor.

CONCLUSION

1. The authorization to determine which streets are to undergo

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repairs with gas tax moneys may be delegated by a city council of third class cities to its street committee.

2. Substantial public improvements with gas tax moneys can only be accomplished by the exercise of formal legislative power. This duty may not be delegated by the city council of third class cities.

3. The exercise of legislative power by third class cities authorizing street improvements and expenditures of money is through the enactment of city ordinances.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGB:MW

Opinion No. 281, answered by letter
(Clyde Burch)

August 24, 1962



Mr. June R. Rose
Chairman, Industrial Commission
of Missouri
State Office Building
Jefferson City, Missouri

Dear Mr. Rose:

This is in response to your letters of July 16th and July 23rd, in which you inquire as to the applicability of the Prevailing Wage Law (Sections 290.210 through 290.310) to the Rolla School of Mines at Rolla, Missouri.

On March 16, 1962, you made an inquiry of this office as to whether this same act was applicable to the University of Missouri. The Rolla School of Mines is a division of the University of Missouri and we believe our answer to that inquiry dated April 18, 1962, covers the question now presented.

The question you present involves an interpretation of the Prevailing Wage Law and its application in light of Article IX, Sec. 9(a) of the 1945 Missouri Constitution.

Article IX, Sec. 9 (a) reads as follows:

"The government of the State University shall be vested in a board of curators consisting of nine members appointed by the governor, by and with the advice and consent of the senate."

We know of no court case ruling on the application of the Prevailing Wage Law to the University of Missouri or its division at Rolla in light of the above quoted constitutional

provision. However, the Supreme Court of Missouri, en Banc, in the case of State v. McReynolds, 193 S.W. 2d 611, at page 613 states:

"The broad powers historically exercised by the curators without specific legislative authority or appropriations present a different situation from an ordinary municipal corporation depending entirely upon taxation for its support and with powers rigidly limited by statute or charter."

We have considered the broad general language of the above quoted constitutional provision and the liberal interpretation given this provision by the appellate courts of this state. In addition earlier opinions by this office, construing the word "government" as found in this constitutional provision, have adopted a broad interpretation.

In the opinion of January 29, 1934 to Orville M. Barnett, Attorney General McKittrick considered the applicability of the State Purchasing Agent Act (now Sec. 34.010 et seq.) to the University of Missouri in light of the language in the Missouri Constitution now contained in Article IX, Sec. 9(a). The ruling was that said constitutional provision prevented the Purchasing Agent Act from applying to the University of Missouri. In the opinion of December 19, 1955 to De Vere Joslin, Attorney General Dalton considered the same constitutional provision in connection with the investment of funds by the Board of Curators of the University.

The Prevailing Wage Law was enacted in 1957 and we understand that the University has been involved in substantial construction projects continuously since that date. In view of what appears to be a long continued acquiescence by your agency in permitting the University to operate without the application of this law and, particularly, in view of the broad interpretation given this constitutional provision by the available authority we feel constrained to suggest that you interpret this law as not applying to the University of Missouri or its division at Rolla.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

Opinion No. 288, Answered by Letter
(Albert J. Stephan, Jr.)

September 12, 1962



Mr. William A. Geary, Jr.
Suite 400 Columbia Building
318 North 8th Street
St. Louis, Missouri

Dear Mr. Geary:

This is in response to your inquiry of July 20, 1962, as to whether the state liquor tax exemption enjoyed by distillers on sales made directly to military installations is a valid one in light of the fact that Missouri wholesalers are required to pay the tax on their sales to such federal instrumentalities.

We have investigated the practice you described and have learned that out-of-state distillers are permitted to ship liquor directly to military installations for sale thereon via licensed carriers without the payment of the gallonage tax as provided for in Section 311.550, Mo. Cum. Supp., 1961. However, when liquor is sold by a foreign distillery to a Missouri wholesaler who ultimately sells the same liquor to a military installation, the tax is paid on that liquor. The result is that the foreign distillery has a competitive advantage in its sales to military installations in at least the amount of the gallonage tax.

An opinion was prepared by this office at the request of Covell R. Hewitt and issued on September 19, 1949, which we believe disposes of the part of your question directed at the validity of the tax advantage which results when an out-of-state distillery sells directly to a military installation. The conclusion of the opinion, a copy of which is attached hereto, reads in part:

Mr. William A. Geary, Jr.

"It is the opinion of this office that officers' clubs on military reservations in the State of Missouri as instrumentalities of the federal government are not subject to the jurisdiction of the State of Missouri, except as specifically reserved by the act of cession. The Department of Liquor Control has no jurisdiction over the sale of liquor by such officers' clubs or the purchase by them of liquor from sources outside of the State of Missouri."

Having re-examined that opinion, we believe it accurately states the law as it exists at this time and that sales and deliveries to military installations are beyond the ambit of the liquor control law generally and the gallonage tax specifically.

But your particular question is whether the same should not hold true with regard to sales by wholesalers located in this state. That question must be answered in the negative.

As our basis for this position, we invite your attention to Section 311.550, Mo. Cum. Supp. 1961, which provides in part:

"(3) The person who shall first sell such liquor to any person in this state shall be liable for the payment."

Section 311.553, Mo. Cum. Supp., 1961, then goes on to squarely place the duty of paying the gallonage tax imposed by Section 311.550, supra, on any out-of-state manufacturer or solicitor who causes the importation into this state of any taxable liquor "for sale or use for beverage purposes within this state." (Emphasis added)

Thus, the tax is actually not on the Missouri wholesaler's sale but on that of the out-of-state distiller. Moreover, examination of the opinion attached hereto and the authorities cited therein reveals that, for purposes of the liquor control laws of this state, sale to and use of liquor on military

Mr. William A. Geary, Jr.

reservations cannot be regarded as a sale or use "within this state". However, the sale of liquor to a Missouri wholesaler (regardless of who the wholesaler's vendee may be) is most certainly a sale "within this state" and therefore taxable.

We are, therefore, constrained to rule that out-of-state distillers should not be relieved of payments of the gallon-age tax on liquor sold to Missouri wholesalers for re-sale to military installations.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enclosure

AJS:ms

ELECTIONS:
SUFFRAGE:
VOTER REGISTRATION:
PRIMARY ELECTIONS:
GENERAL ELECTIONS:

The 29th day prior to any general or primary election day is last day for valid registration for such election; persons registering after 29th day and before election day may not vote in election but are properly registered for next election. County Clerk should withhold registration cards of late registrants until day after July 27, 1962 election immediately following 28-day period and then place in proper binders.

Honorable Arthur B. Cohn
Prosecuting Attorney
Pulaski County
Waynesville, Missouri



Dear Mr. Cohn:

This will acknowledge receipt of your letter of July 20, 1962, requesting an opinion of this office. Your request reads as follows:

"Under Section 114.120 Missouri Revised Statutes of 1959, it states that 'No person is entitled to register within a period of twenty-eight (28) days prior to any primary or general election in which the registration records provided for in this chapter are to be used'.

"Under this Section, what would be the last day for registration for the primary election to be held August 7, 1962?"

You have also asked would the registrants registering subsequent to July 9, 1962, be properly registered to vote in the November election, and you have further inquired as to the proper procedure for handling the registrations of the registrants after July 9, 1962.

The statute which you have reference to, Section 114.120, RSMo 1959, reads as follows:

"No person is entitled to register within a period of twenty-eight days prior to any primary or general election in which the registration records provided for in this chapter are to be used. The county clerk shall not cancel or reinstate any registration within five days prior to any primary

Honorable Arthur B. Cohn

or general election, except at the direction of the circuit court. If on election day it comes to the attention of the county clerk that, through inadvertence, a registration card has been placed in the wrong precinct binder, the county clerk shall correct the error on the blue registration record and shall send the record to the proper voting precinct."

The general rule for computation of time is contained both in Supreme Court Rule 31.01 and Section 506.060, RSMo 1959. The pertinent portion of Section 506.060 reads as follows:

"1. In computing any period of time prescribed or allowed by this code, by order of court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a legal holiday."

While the above quoted statute and Supreme Court Rule 31.01 pertain to court procedure, yet we think the principle of the statute is applicable to the election law statute Section 114.120. In the question before us the designated period of time occurs before the specified date and not afterwards as is set out in the above quoted portion of Section 506.060. However, the same general rule will apply and an application of it to our set of facts leads us to the determination that July 9, 1962, is the last date upon which a person may register as a qualified voter for the primary election to be held August 7, 1962.

In a case analogous to the one before us, *State ex rel Cassidy vs. Zaller et al*, Ohio, 50 N.E. 2d 991, the Supreme Court of Ohio was ruling upon Section 4785.92, General Code

Honorable Arthur B. Cohn

of Ohio (since repealed), which provided that objections to nominating petitions could be made during a certain specified period of time. The statute there under consideration, while not identical to our statute, is similar in purpose and reasoning, and it is felt that the decision arrived at in construing this statute is applicable to our case. The statute there under consideration read as follows:

"Such petition papers shall be preserved and open, under proper regulations, to public inspection for at least five days prior to the fifty-fifth day preceding the election, during which time objections may be filed thereto, and be heard by the secretary of the state or board, as the case may be."

The Ohio Supreme Court, in ruling adversely to an objection which had been filed on the fifty-fifth day before the election, stated at page 992:

"* * * It is well settled that when a statute requires an act to be done within a specified number of days prior to a fixed date, the last day, namely, the fixed date, is to be excluded and the first day included in making the calculation * * *"

After stating the election date was November 2, the court continued as follows:

"Relators' protests were filed on September 8, 1943, or on the fifty-fifth day before the election. Therefore, the filings were too late as the period of five days or more in which protests containing objections could have been filed must precede the fifty-fifth day prior to the election day. In any event, September 7th was the last day on which such protests could have been filed."

So it is also in our case. When we exclude the named date, August 7, and deduct twenty-eight days, as provided in Section 114.120, RSMo 1959, we find that the first day of the period to be included in the prohibition is July 10. Therefore, the last day that a valid proper registration for the August 7 primary could be made would be the day prior to July 10, or July 9, 1962.

Honorable Arthur B. Cohn

We do not intend to and do not hold that registration by a person on July 10, 1962, or even later is void or invalid for all purposes. Section 114.120, supra, states in part:

"* * * any primary or general election in which the registration records provided for in this chapter are to be used. * * *"
(underscoring added)

It would seem, therefore, that while a registration subsequent to July 9, 1962, would not be effective to confer voting privileges for the August 7, 1962, primary it would be effective and qualify as a proper registration for the next succeeding general election to be held in November, 1962.

You have also asked what is the proper procedure if persons are allowed to register during the twenty-eight day period preceding any primary or general election. It is suggested that a satisfactory procedure would be to withhold the registration sheets or cards until after the primary or general election immediately following this twenty-eight day period and at that time insert them in the proper registration books. It is felt by this office that the above would be a proper and legal method of handling this problem.

CONCLUSION

Therefore, it is the opinion of this office that:

1. The twenty-ninth day prior to the date of the election is the last date upon which a valid registration may be made, which in this case is July 9, 1962, for the primary election of August 7, 1962.
2. A registration subsequent to July 9, 1962, while not effective to confer voting privileges for the August 7 primary would be effective and qualify as a proper registration for the next succeeding general election to be held in November of 1962.
3. A satisfactory procedure to assure that persons registered subsequent to July 9, 1962 (during the twenty-eight day period prior to August 7, 1962), are not allowed to vote in the August 7, 1962, primary would be for the county clerk to withhold the registration cards or sheets until after the primary election on August 7, 1962, and at that time insert them in the proper registration books.

Honorable Arthur B. Cohn

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert R. Northcutt.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

RN:BJ

July 27, 1962

FILED
291

Honorable Thomas D. Graham
Speaker, House of Representatives
State of Missouri
512 Central Trust Building
Jefferson City, Missouri

Dear Mr. Graham:

This is to acknowledge receipt of your letter under date of July 25, 1962, requesting an opinion of this office, wherein you asked:

"May a city attorney, as an officer of a third class city operating under the provisions of Chapter 77, R.S.Mo. 1959, lawfully contract with the City, through its Mayor and City Council, to review, revise and codify the ordinances of the city for a compensation, which would be in addition to the salary of the city attorney as provided by an ordinance of the city, when the duties of the city attorney, as prescribed by the ordinances of the city, do not require him to review revise and codify the ordinances of the city, without being in violation of Sections 77.440, 77.470 and 106.300 R.S.Mo 1959?"

In reference to your inquiry, an opinion under date of May 9, 1955, issued to the Honorable Haskell Holman as auditor of the State of Missouri, concluded that the Board of Aldermen of fourth class cities is not authorized to pay its mayor a fee of thirty dollars for auditing the books of said city and such acts violate the provisions of Section 106.300, RSMo 1949. Another opinion under date of May 15, 1958, issued to the Honorable Rolin T. Boulware as Prosecuting Attorney of Shelby County, Missouri, concluded that a lease consummated by city officials who have a pecuniary interest in it comes within the

Honorable Thomas D. Graham

purview of Section 106.300, RSMo 1949. Further, an opinion under date of December 8, 1960, issued to Honorable Charles A. Powell, Jr., Prosecuting Attorney of Macon County, Missouri, concluded that an assistant city marshall of a third class city is prohibited by law from selling the city in which he is assistant city marshall, a motor vehicle, because of the fact that he is a city officer. (Copies of the foregoing opinions are enclosed herewith.)

In view of the conclusions reached in the aforesaid opinions and the provisions of Sections 77.370, 77.400, 77.470, and 106.300, RSMo 1959, we conclude that the proposed action, as described in your request, comes within the purview of Sections 77.470 and 106.300, RSMo 1959.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PAS:lt

Enclosure

OPINION NO. 292
ANSWERED BY LETTER

August 9, 1962

Honorable J. R. Fritz
Prosecuting Attorney
Pettis County
Sedalia, Missouri

FILED
292

Dear Mr. Fritz:

This office is in receipt of your request for a legal opinion as to whether or not a Sheriff who was appointed Deputy Juvenile Officer by the Circuit Court, is entitled to mileage expense in performance of his duties as Deputy Juvenile Officer.

Recently, we received a request for an opinion from Honorable J. R. Eiser, Prosecuting Attorney of Holt County, as to what mileage the Juvenile Officer is entitled to charge for miles travelled by him in his official capacity. Said inquiry was answered by letter.

In our reply, attention was called to Section 211.191.2, RSMo 1959, which authorizes the payment of mileage allowance, (not to exceed that allowed state officers for each mile travelled upon official business) to be paid juvenile and deputy juvenile officers while performing official duties.

Our letter further called attention to the rate per mile for each mile actually travelled by such state officers, which is eight cents per mile. It is believed that the provisions of Section 211.191.2, RSMo 1959, and those of our letter to Mr. Eiser, a copy of which is enclosed, fully and completely answer your inquiry.

Trusting the above information will be helpful, I am

Very truly yours,

THOMAS F. EAGLETON
Attorney General

August 1, 1962

Dr. George A. Ulett
Acting Director
Division of Mental Diseases
722 Jefferson Street
Jefferson City, Missouri

FILED
297

Dear Dr. Ulett:

This refers to your letter of June 7, 1962, and our subsequent conversations, concerning the operation of a work-study program in the field of social work in connection with institutions within the Division of Mental Diseases.

It is our understanding that this program contemplates the following facts: A state hospital employs a person as a Social Work Intern I (an unclassified position under the merit system) at a salary of \$320 per month. Such person commences work in June (or possibly later in the summer) and works on a full time basis and receives full pay until September. From September through May, he is enrolled for graduate training in the School of Social Work at the University of Missouri (or some other recognized school in this field) and devotes half time to academic studies. During this period, he works half time and receives half pay from the employing hospital. Such work may be done at the employing hospital or another institution in the Division of Mental Diseases or, in order to give the employee broader experience, he may be assigned to work for another state agency (e.g.; in a welfare office). This work serves as part of the educational program.

During the following June and July, the employee works full time and receives full pay at the employing hospital. On August 1, the employee begins what is termed his "block assignment," which is full time work in a state agency but constitutes part of the educational program. This continues

through January and the employee (who is promoted to Social Work Interne II with a \$335 per month salary at the beginning of the second year) receives his full salary from the employing hospital. As in the case of the first year work, the employee's assignment is not necessarily at the employing hospital or another institution in the Division of Mental Diseases but, instead, may be at some other state agency. From February until his graduation in June, the employee is on leave, and receives no pay, while he devotes full time to academic studies at the School of Social Work.

This program leads to a master's degree in social work. A person participating in the program is committed to work as a social worker in an institution within the Division of Mental Diseases for two years after his graduation. Under work-study programs conducted by other state agencies, persons employed and paid by such agencies are assigned to work in state hospitals as part of such programs.

This is to advise you that we see no legal objection to the operation of a work-study program such as is described above in connection with institutions within the Division of Mental Diseases.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

August 6, 1962



Honorable Wm. H. Frye
Assistant Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Frye:

We have your letter of August 1, 1962, wherein you request the opinion of this office on the legality of the operation of a commercial motor vehicle in Missouri, which vehicle is owned by an Alabama corporation, is licensed in Alabama but based in Missouri.

Missouri and Alabama are parties to the Multi-State Reciprocal Agreement which provides for the granting of reciprocity among the signatory states. This Agreement provides that commercial motor vehicles are to be licensed in the base state of such vehicles, and when vehicles are properly registered in such state they are entitled to operate on the highways of the other member states without the payment of additional registration fees. The base state is that state where the owner or operator of the vehicle maintains a place of business from which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled.

With this in mind and turning to the particular facts of your inquiry, it can be seen that a Missouri based carrier must register its vehicles in Missouri under the terms of the Multi-State Agreement. The vehicles here involved are not entitled to reciprocity for their operation in Missouri on an Alabama registration for this reason. Since they are not entitled to

Honorable Wm. H. Frye

#2

reciprocity and do not bear a Missouri license, their operation on Missouri highways is illegal.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

October 5, 1962

FILED
302

Honorable Stephen E. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Strom:

This will reply to your letter requesting our opinion, as follows:

"I request your opinion whether the County Welfare Director or other officer of the Division of Welfare is a proper person to institute proceedings for the involuntary hospitalization of a mentally ill person under the provisions of Section 202.807 R.S. Mo., 1959, where such applicant is fully and properly advised of the facts concerning the mental illness and the necessity for such commitment and where none of the other persons described in said section are available for or willing to sign such application."

Your request relates to the opinion we issued to you under date of July 6, 1962, in which we held that during the pendency of a criminal charge against a defendant, both in the magistrate court prior to a preliminary hearing on the complaint and in the circuit court thereafter if the defendant is held for the circuit court and an information is filed, the probate court has no authority to exercise jurisdiction over the person of the accused in a proceeding filed under Section 202.807 RSMo. We held that if you desired a probate court hearing with respect to the mental condition and need for hospitalization of the defendant, you must

first withdraw the complaint pending in the magistrate court and terminate the proceedings therein. You now inform us that you have determined to withdraw the present complaint, "file involuntary commitment procedures in the Probate Court, and later refile the complaint to terminate the running of the Statute of Limitations."

As you point out in your letter, Section 202.807 RSMo provides that a proceeding for the involuntary hospitalization of an individual may be commenced by the filing of a written application with the probate court by "a friend, relative, spouse, or guardian of the individual, or by a licensed physician, a health or public welfare officer, or the head of any public or private institution in which such individual may be." The application must be accompanied and supported by a certificate of a licensed physician or "a written statement by the applicant that the individual has refused to submit to examination by a licensed physician." It is evident that an application, filed by an authorized person, together with the supporting certificate or statement, is jurisdictional and that the probate court is not authorized to hold a hearing or make a finding until and unless such an application is filed.

Your specific question is whether the county welfare director or other public welfare officer employed by the division of welfare is a proper person to institute proceedings for the involuntary commitment of the individual against whom you have filed murder charges. Section 202.807 must be construed together with other provisions relating to the hospitalization of mentally ill individuals, and in particular with Section 202.797 RSMo, insofar as your specific question is concerned. Section 202.797 RSMo provides for the admission of an individual to a hospital upon written application to the hospital by "a friend, relative, spouse, or guardian of the individual, a health or public welfare officer, or the head of any institution in which said individual may be."

It may be noted, therefore, that the very persons authorized under Section 202.807 (other than a licensed physician), to apply to the probate court, are authorized to make application to a hospital for the purpose of the care and treatment of the individual in a mental hospital under the conditions set forth in Section 202.797. The latter section imposes certain duties upon the "county welfare department" in connection with the application, and the action to be taken with respect thereto.

It is the opinion of this office that the term "county welfare department," as used in the statute, has reference to and means the office which the division of welfare is required to establish in each county under Section 207.060 RSMo. It is apparent, therefore, that the term "public welfare officer," as used in paragraph 1(1) of Section 202.797, would include the county welfare director and any other public welfare officer employed by the county welfare department.

In view of the identical phraseology in these two sections, it is our opinion that the term "public welfare officer," has the same meaning as used in Section 202.807 RSMo as it has under our construction of Section 207.797. It follows from the foregoing that a county welfare director, or other public welfare officer employed by the county welfare department, is a person authorized to institute an action under the provisions of Section 202.807. However, this does not mean that such a public welfare officer may be compelled to file an application for the involuntary commitment of an individual, nor that he should do so simply because a prosecuting attorney requests such action on his part.

We believe that the Legislature selected the persons authorized to file applications for involuntary commitment advisedly. The clear legislative intent is that such proceedings should be instituted by persons having personal or official knowledge of the necessary facts, or who, through their relationship to the individual, have a direct concern that he be given the necessary treatment for his mental illness.

A friend, relative, spouse or guardian would ordinarily have personal knowledge as to the need for care and treatment. It seems strange that if the individual in question is in such urgent need of hospitalization, as your letters would indicate, the relatives and friends of such individual would be so unconcerned as to be unwilling to apply for involuntary commitment. The head of the institution in which the individual is confined would also have personal, or at least official, knowledge of the need for care and hospitalization.

As for a health and public welfare officer, it is quite possible that, incident to the performance of his official duties, such officer might acquire personal knowledge that the individual has need for hospitalization and mental treatment. If he acquires such knowledge incident to the performance of his official duties and

believes it in the public interest that the individual be hospitalized, then he has the authority under Section 202.807 to file and prosecute an application for such involuntary hospitalization. He is under no mandatory duty to file an application in any event, and particularly so where he has no personal knowledge obtained in the course of the performance of his official duties.

The filing of an application for an involuntary commitment and the prosecution thereof is not a perfunctory act, nor one lightly to be undertaken. The direct responsibility for instituting the proceeding is upon the person who files the application in the probate court. Whether such responsibility shall be undertaken involves the exercise of judgment, and such judgment should properly be based on facts within the personal knowledge of the person authorized to commence the proceeding.

You inform us that the head of the institution in which the individual is presently confined has not agreed to sign the necessary application. Surely, the head of the hospital in which the individual is confined, with his personal and official knowledge of the essential facts, would be the logical person in the present situation to file the necessary application, rather than the county welfare director, who has no personal knowledge respecting the facts. And if the head of the hospital is unwilling to institute the proceedings you desire, there would appear to be more justification for a mere welfare officer, with no personal contact with the individual, to be equally or more reluctant to sign the application and to prosecute the proceedings.

As prosecuting attorney, you have no authority to substitute your judgment for that of the county welfare director. Had the Legislature intended that the necessary application be filed at the request of the prosecuting attorney, it would have directly authorized the prosecuting attorney to act in this connection.

Summarizing: A county welfare director, or other public welfare officer employed by the county welfare department, is a person authorized to institute and to prosecute a proceeding in the probate court under Section 202.807, but he may not be compelled to institute or prosecute such a proceeding if he deems it inadvisable or improper to do so. Hence, if, for any reason, none of the other persons, including the head of the state hospital in which the individual is confined, is willing to institute proceedings under Section 202.807

Honorable Stephen E. Strom

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(and since the prosecuting attorney is not one of the persons authorized to file an application for involuntary commitment of the individual involved), there is no means provided by statute whereby you may file involuntary commitment procedures in the probate court.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN: sr

SUPPLEMENT TO LETTER DATED AUGUST 8, 1962,
ANSWERING OPINION REQUEST NO. 306 BY LETTER.

August 10, 1962



Honorable Bernard W. Gorman
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Mr. Gorman:

With reference to your telephone conversation of August 10, 1962, with Gordon Siddens, Assistant Attorney General, and with further reference to your opinion request dated August 2, 1962, we have the following observations:

1. The election referred to in Section 120.550 as amended last in 1959 is the general election, not the primary election.
2. There is no reason why the name of the candidate selected by the county committee should appear on the primary ballot because the candidate selected by the county committee is the party nominee to be voted on only at the general election.
3. Under the time schedule specified in Section 120.550 as amended there is more than thirty days remaining before the general election to permit the county clerk to have the nominee named by the county committee put on the ballot as the party nominee for the office.
4. The opinion of this office dated September 18, 1956, to Honorable John W. Mitchell, on page 3 the last two paragraphs before the "Conclusion," states the position of this office respecting the point under consideration. The amendment of Section 120.550 in 1959 modifies the principle stated merely to require the nomination of

Honorable Bernard W. Gorman #2

candidate B made by the county committee to fill a vacancy caused by the resignation or withdrawal of candidate A (as stated in your inquiry) to be filed with the county clerk thirty days before the general election on November 6, 1962.

We hope the foregoing fully explains our view of the law.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml

OPINION NO. 306 ANSWERED BY LETTER.

August 8, 1962

Honorable Bernard W. Gorman
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Mr. Gorman:

This will acknowledge receipt of your letter dated August 2, 1962, requesting an opinion of this office relating to the interpretation of Section 120.550 in filling vacancies for candidates who have withdrawn.

We enclose herewith copy of an opinion issued by this office dated September 18, 1956, to Honorable John W. Mitchell. We believe this opinion answers the questions you have asked.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:ml
Enc.

October 1, 1962



Honorable Warren E. Hearnese
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Hearnese:

This is in answer to your letter of August 10, 1962,
requesting an opinion of this office on the following
matters:

"Assuming the county court of a county
has duly divided a city into wards as
part of the county, democrat and re-
publican committees allowing each ward
to elect a committeeman and committee-
woman, said city being part of a town-
ship which is represented in the county
committee by a committeeman and committee-
woman. Can a resident of a ward within
the city vote for the candidate for the
committee from his ward and also the
township?

"If the answer to the above is no, must
separate ballots be printed for each ward
and the township not in any of the wards
listing only the names of the candidates
eligible to be voted upon by the voters
of the respective ward or township?"

Enclosed herewith is an opinion of this office written Feb-
ruary 14, 1952, to the Hon. Robert G. Kirkland, Prosecuting At-
torney of Clay County, Missouri. In this opinion, among other
things, we concluded that when a city is located within a township

and each is entitled to a committeeman and a committeewoman, the committee members from the township may be voted upon only by the voters of the township residing outside the city. The reverse is also true. The residents of the township living within the city may vote only for those committee members from the city or the various wards, if the city has been divided into wards. The statute under which this opinion was written has not been changed, nor have any decisions of the courts caused us to revise this opinion. It would certainly be unreasonable to hold the Legislature would intend a voter, living in a city which is a part of a township, to be able to elect a committee member from his ward in the city and also the township.

In answer to your second question, as each voter may vote only for committee members from his township or ward, separate ballots must be printed for the voters of each ward and of the township, not in any of the wards, listing only the names of the committee candidates eligible to be voted upon by the voters of the respective ward or township.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JHD: sr

Enclosure

November 2, 1962

FILED
315

Honorable John A. Honssinger
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Mr. Honssinger:

In your letter of August 26, 1962, regarding Section 302.302, Mo. Cum. Supp. 1961, you submit the following question:

"What does the term 'or forfeiture of collateral' mean? Does it mean forfeiture of collateral deposited for appearance on a traffic charge in the form of a bail bond, or does it mean collateral that might be deposited under the Safety Responsibility Act?"

Section 302.302, Mo. Cum. Supp., provides for the State Director of Revenue to put into effect a point system for the suspension and revocation of chauffeurs' and operators' licenses. It further provides that "points shall be assessed only after conviction or forfeiture of collateral".

Section 302.010, Mo. Cum. Supp. 1961, provides in part that when used in this chapter the following words and phrases mean: (4) "Conviction", any final conviction; also a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction, except that when any conviction as a result of which points are assessed under section 302.302 is appealed.

Under Section 302.010 forfeiture of bail or collateral deposited for the defendant's appearance in court is considered as a conviction for the purposes of assessing points

Honorable John A. Honssinger -2-

under Section 302.302.

These sections were enacted by the legislature in 1961 as part of Senate Bill No. 90 and are contained in Chapter 302 of the Revised Statutes of Missouri concerning drivers' and chauffeurs' licenses.

We believe that "forfeiture of collateral" as used in Section 302.302, supra, refers to forfeiture of bail or collateral deposited to secure defendant's appearance in court as provided for under Section 302.010(4), supra, and that it does not refer to a bond of security deposited as provided for under the Safety Responsibility Act found in Chapter 303, RSMo 1959.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

MM:lt

September 21, 1962



Honorable William H. Bruce, Jr.
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Mr. Bruce:

This letter is in response to your letter of August 22, 1962, requesting an opinion on the following matters:

"The Clerk of the County Court and the various officers of the County, together with the Democratic Central Committee of Reynolds County, Missouri, have all asked to write to you for an official opinion. In addition, I need an official opinion myself.

One Robert B. Baker filed a declaration as a candidate for nomination as Prosecuting Attorney in the Democratic Primary of August 7, 1962. One Billy Joe Fox did the same for County Collector on the Democratic ticket. Both were defeated.

Section 120.370 provides that no person shall file a declaration to be the candidate of more than one party.

Mr. Baker, Mr. Fox, and a Mr. Robert C. Stark, who did not seek nomination on August 7, 1962, have now filed petitions to establish a new political party in Reynolds County, in which petitions, Mr. Baker seeks to run for Prosecuting Attorney, Mr. Fox for County Collector, and Mr. Stark for State Representative. They are attempting to run on the 'Hardhead Party' ticket; their new party.

The petitions were filed with the County Clerk on August 20, 1962. All three of these gentlemen refused to pay any filing fee whatever. In addition, Mr. Fox refused to sign his declaration. Section 120.220 provides that such petitions must be filed 'at least 78 days' prior to the general election. Section 120.210 requires a statement of candidacy and the whole chapter seems to require a filing fee (Cf. 120.360).

I am of the opinion that the wording of the statute, 'at least 78 days prior' would have required that the petitions be filed on Sunday, August 19th. The County Clerk made a point of being available until midnight. However, in some instances, when a thing is to be done on a Sunday, the time is extended to the following Monday. However, in this case the statute reads (at least) rather strongly.

The clerk has taken the position that the petitions were filed too late; that no person may be the candidate of two parties in the same election; that the declaration must be signed and that the filing fees must be paid. Accordingly, he does not plan to place the 'Hardhead Party' on the ballot. However, we need your opinion, since we want to be fair about the matter. Since the ballots must be printed shortly, we would like to have an early reply."

The statutes of Missouri provide two methods by which a candidate for public office may have his name placed on the ballot at the general election. Sections 120.140 to 120.230 provide for the nomination of a candidate by new political parties and by a required number of electors filing petitions. (All references to sections herein will be to sections in Revised Statutes of Missouri, 1959, unless otherwise designated). Sections 120.300 to 120.650 provide for the nomination of candidates by established political parties by the primary election method. *Preisler v. City of St. Louis*, (1959) Mo. 322 S. W. 2d 748. The petition method is a separate and supplementary method to the state primary election for nominating candidates. *State v. Toberman*, (1954) Mo. 269 S. W. 2d 753. The candidates mentioned in your letter are apparently seeking a nomination as candidates of a new political party governed by Section 120.160.

Section 120.350 provides that candidates, with certain exceptions, must pay filing fees as prescribed therein. Section 120.340 requires each candidate to file a declaration of candidacy. Section 120.370 forbids any candidate to file more than one declaration indicating the party designation under which his name shall be printed on the official ballot. It is our opinion each of these sections and the requirements contained therein apply only to candidates seeking the nominations by the state primary method. They do not apply to candidates listed for nomination in petitions for the establishment of new political parties. Therefore, the County Clerk may not refuse to list the candidates in question on the grounds they have not complied with these sections.

The next general election is scheduled for November 6, 1962. Section 1.020(3). Section 1.040 provides:

"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday it shall be excluded."

Excluding November 6th, the last day a petition to establish a new political party may be filed is August 19, 1962; seventy-eight (78) days previous to the election for which the candidates are nominated. Section 120.122. As this day falls on a Sunday it shall be excluded, and Monday, August 20, 1962, becomes the final date for filing such a petition. No petition filed on that date may be excluded as untimely filed in violation of Section 120.220.

However, Section 120.210 requires each petition of nomination to include a statement of candidacy for each of the candidates named therein. Each such statement must be subscribed and sworn to by the candidate in question. It is the opinion of this office that this Section also applies to candidates listed on petitions seeking to establish new political parties. Section 120.160, subparagraph 3. Therefore, the County Clerk should not place the name of anyone as a candidate on the "Hardhead Party" ticket who has not filed a signed and notarized statement of his candidacy. It is also our opinion the County Clerk may not refuse to place the "Hardhead Party" and candidates who have properly filed declarations of candidacy on the ballot for the other reasons given.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

October 5, 1962



Mr. Lawrence A. Schneider, Director
Commerce and Industrial Development
Eighth Floor Jefferson Building
Jefferson City, Missouri

Dear Mr. Schneider:

This is in reference to your letter of August 30, 1962, regarding the interpretation of Section 137.093, Mo. Cum. Supp. 1961.

In your letter you submit certain questions based on hypothetical facts. Ordinarily we give legal opinions only on specific facts of individual cases because frequently only a slight change in the factual situation results in the application of a different principle of law.

Section 137.093, supra, was enacted by the last legislature and has not been before any appellate court for interpretation. It is similar to Section 79.304 of the Revised Statutes of Kansas, which section likewise has not been construed by the appellate courts of that state.

Section 137.093, supra, provides in part that tangible personal property moving through this state or consigned to a warehouse in this state from outside this state, in transit to a final destination outside this state shall not acquire a situs in this state for taxation purposes.

This statute makes no distinction between foreign or domestic corporations or persons and in my opinion it applies alike to all. Under this statute the source and ultimate destination of the property are the determining facts to be considered and not who is the owner of the property. As we view the matter, title to the property is immaterial in determining whether the property is taxable. The property must

Mr. Lawrence A. Schneider

-2-

be from outside this state and when it enters this state be in transit to a destination outside this state before it would be exempt from taxation under this provision.

I believe all the questions you have submitted can be answered by applying these general principles of law.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

MM:ms

VILLAGES: In filling vacancies on the board
CHAIRMAN: the chairman of the Board of
VOTE: Trustees of the Village of Bel-
BOARD OF TRUSTEES: Ridge has no vote unless there is
a tie.

Opinion No. 328

September 13, 1962



Honorable Norman H. Anderson
Prosecuting Attorney
St. Louis County
Court House
Clayton 5, Missouri

Dear Mr. Anderson:

This is in reply to your letter of August 31, 1962,
which reads as follows:

"I respectfully request an official
opinion relative to the proper inter-
pretation of Sec. 80.230, Revised
Statutes of Missouri. I have been
asked to obtain this opinion by the
City officials of the Village of
Bel-Ridge, Missouri.

"The section involved is as follows:

80.230. TRUSTEES -- VACANCY, HOW
FILLED.-- All vacancies in the
board of trustees shall be filled
by the remaining members of the
board. In case the office of
chairman becomes vacant, the re-
maining members shall select one
of their own number as temporary
chairman and then proceed to elect
some person to fill such vacancy;
provided, the chairman or temporary
chairman shall have no vote except
in case of a tie.

"The factual background giving rise to
this request for an interpretation is

Honorable Norman H. Anderson

as follows: The Chairman of the Board of Trustees of the Village of Bel-Ridge, Missouri, recently resigned prior to the end of his elective term. The remaining Board members elected a temporary Chairman and then voted to elect the temporary Chairman the permanent chairman. The Board now wants to elect a person to fill the vacancy created by the election of the present Chairman.

"Does the present Chairman have a vote in filling the vacancy on the Board that was created by his election to Chairman, or would he be able to vote only in case of a tie vote by the other Board members?"

In answering your question we refer you to the case of *Krug v. Village of Mary Ridge*, 271 S.W. 2d 867, in which the St. Louis Court of Appeals said at page 872:

"* * * It should be pointed out that the chairman of the board of trustees of a village is not a mere presiding officer with the power to vote only in case of a tie (as in the case of the mayor of the fourth class city, § 79.120). He is entitled to vote on all measures which come before the board, except that in filling vacancies on the board the chairman has no vote unless there is a tie. Section 80.230. * * *"

It is our opinion that the last provision of Section 80.230, RSMo 1959, quoted in your letter, and the case of *Krug v. Village of Mary Ridge*, which we have cited, are controlling in this instance. The "present chairman" is governed by this law regardless of whether he is the chairman or the temporary chairman, and he does not have a vote in filling a vacancy on the board and he would be able to vote in such instance only in case of a tie.

Honorable Norman H. Anderson

CONCLUSION

It is, therefore, the opinion of this office that in filling vacancies on the board the chairman of the Board of Trustees of the Village of Bel-Ridge has no vote unless there is a tie.

This opinion, which I hereby approve, was prepared by my Assistant, Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WW:bj;sr

WIRE PROTECTION DISTRICTS:
MUNICIPAL CORPORATIONS:
TAXATION:
MUNICIPALITY:

The board of directors of a fire protection district in a county of the first class has the power to provide for the pensioning of the salaried members of its organized fire department of the district if such authority is approved as provided for in Section 321.220 (15), RSMo Supp. 1961, H.B. No. 12, Section 1, 71st General Assembly, and that by reason of Section

321.240, RSMo 1959, the rate of tax levy for such district's operation costs, to include "a pension and retirement plan" "shall not exceed thirty cents on the one hundred dollars valuation."

September 27, 1962

Honorable E. J. Cantrell
Member, Missouri House of
Representatives
Third District
St. Louis County
3406 Airway
Breckenridge Hills, Missouri



Dear Mr. Cantrell:

Reference is made to your request for an official opinion of this office which reads in part as follows:

"I would like to have an opinion from your office concerning H.B. 12 passed and signed into law at this last legislature.

"Through H.B. 12 would it be legal for Fire Districts in first class Counties to formulate a retirement plan for its employees if a favorable vote is given by the people in a fire district? If the people in a fire district give their approval, would it be possible for this fire district to tax its people more than the present thirty cents maximum for the sole purpose of a pension and retirement plan?"

As to your question, "Would it be legal for Fire Districts in first class Counties to formulate a retirement plan for its employees if a favorable vote is given by the people in a fire district?", your attention is directed to H.B. 12, 71st General Assembly, now Section 321.220, RSMo Supp. 1961, subparagraph 15, which provides in part that the board of directors of such a fire protection district has the power to provide for the pensioning of the salaried members of its district if authorized by a majority of the qualified voters of the district concerned.

As to the legality or constitutionality of such a statutory provision, your attention is directed to Section 25, Article VI, of the Constitution of Missouri, 1945, relating to the limitation of the use of credit and grants of public funds by local governments.

Note in reading this section that one of the exceptions made to the principle "that no county, city or other political corporation or subdivision of this State shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, * * *" is that the General Assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized fire department.

But, is a fire protection district a "municipality" as contemplated and as that word is used in Section 25 of Article VI of the Constitution?

The Supreme Court of Missouri, en banc, in the case of Inter-city Fire Protection District v. Gambrell, 231 SW2d 193, (360 Mo. 924), discussing such a district stated at page 197:

(It is) "a different type of political subdivision, to wit, a type of municipal corporation duly organized and existing under a general law providing for its incorporation by the decree of the circuit court." (Emphasis Supplied)

This concept is further magnified in the language of the recent decision by the Missouri Supreme Court in the case of City of Olivette v. Graeler, 338 SW2d 827, wherein the Court said at page 835:

"In its strict and primary sense the term "municipal corporation" applies only to incorporated cities, towns, and villages, having subordinate and local powers of legislation. * * * But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts." * * *

"Many public agencies, rendering services of a municipal nature for which a corporate form of organization is provided by law, may properly be included in the category

of 'municipal corporations' in the broader sense. To those mentioned in the Caldwell case could be added county health departments and hospitals, fire districts, and, notably in St. Louis County, the Metropolitan St. Louis Sewer District, 'a body corporate, a municipal corporation and a political subdivision of the state' * * *."
(Emphasis Supplied)

But, again, is such a "municipal corporation" necessarily a "municipality" in the sense as contemplated by the aforesaid Section 25, Article VI of the Constitution? The Supreme Court of Missouri, en banc, in considering the term "municipality" as used in Section 16 of the same Article VI of the Constitution stated in the case of St. Louis Housing Authority v. City of St. Louis, 239 SW2d 289, (361 Mo. 1170), at pages 294-295 the following:

"A 'municipal corporation' is commonly called a 'municipality.' 62 C.J.S., Municipal Corporations, § 1, page 64; State ex rel. Koontz v. Board of Park Commissioners, 131 W. Va. 417, 47 SE 2d 689, 694. By both judicial recognition and common usage 'municipality' is a modern synonym of 'municipal corporation.' 'Municipality' is all embracing. It includes, of course, cities of all classes, as well as towns, but it includes also a non-profit agency, such as plaintiff, which is authorized to exercise public and essential governmental functions. By the General Assembly plaintiff's status is declared to be a municipal corporation exercising public and essential government functions. Webster's New International Dictionary, 2nd Ed., defines municipality as a municipal corporation. The suffix 'ity' denotes state, or condition of being. Thus municipality connotes the state or condition of being municipal in nature. The word 'municipal' is derived from the latin 'municipalis' and implies the right of local self government. Municipality now has a broader meaning than 'city' or 'town', and presently includes bodies public or essentially govern-

mental in character and function and distinguishes public bodies, such as plaintiff, from corporations only quasi-public in nature. 42 C.J. p. 1413; 61 C.J.S., Municipal, page 945; Curry v. Sioux City Dist. TP., 62 Iowa 102, 17 M.W. 191. But the two terms (municipality and municipal corporation) are often interchangeably used. Likewise, 'municipal corporation', in the broader sense now includes public corporations created to perform an essential public service and 'is applied to any public local corporation exercising some function of government.' 'Municipal corporation' now also includes a corporation created principally as an instrumentality of the state but not for the purpose of regulating the internal local and special affairs of a compact community. * * *
(Emphasis supplied.)

In view of the aforesaid authorities, it is the opinion of this office that a fire protection district as provided for "class one counties" in Chapter 321, RSMo, is a "municipality" within the meaning of the term as used in Section 25 of Article VI of our present State Constitution and that, therefore, the Legislature of the State of Missouri had the constitutional authority to enact Subdivision 15 of Section 321.220, RSMo Cum.Supp. 1961, giving the board of directors of such a fire district the power to provide for the pensioning of the salaried members of its organized fire department of the district if such authority is approved as provided therein. This conclusion is further substantiated by the rule of law as stated in the recent case of Borden Company v. Thomason, 353 SW2d 735, when the Supreme Court of Missouri, en banc, quoted with approval at page 743 the language as used in State ex rel. Fire Protection District of Lamay v. Smith, 184 SW2d 593, 1.c. 594, to-wit:

"An act of the Legislature carries the presumption of constitutionality. The court will not declare an act unconstitutional unless it plainly contravenes the Constitution."

As to your final question, "If the people in a fire protection district give their approval, would it be possible for this fire district to tax its people more than the present thirty cents maximum for the sole purpose of a pension and retirement plan?",

we direct your attention to Subsection 15 of Section 321.220, supra, which states in part:

"* * * If a majority of the qualified voters casting votes thereon at the election be in favor of the question, this subdivision shall take effect in the district forthwith and the board shall then and thereafter effect such a program for the pension and benefit payments authorized at the election as shall be necessary for the operation of the district. * * *"
(Emphasis supplied.)

Your attention is then directed to Section 321.230, RSMo 1959, which states in part:

"For the purpose of providing revenue for such districts, the board shall have the power and authority to order the levy and collection of ad valorem taxes on and against all taxable tangible property within the district, * * *"

Then note Section 321.240, RSMo 1959, which states in part, to-wit:

"To levy and collect taxes as herein provided, the board shall in each year determine the amount of money necessary to be raised by taxation, and shall fix a rate of levy which, when levied upon every dollar of the taxable tangible property within the district as shown by the last completed assessment, and with other revenues, will raise the amount required by the district annually to supply funds for paying the expenses of organization and operation * * * which rate of levy shall not exceed thirty cents on the one hundred dollars valuation; * * *."
(Emphasis supplied.)

As indicated by Subsection 15 of Section 321.220, supra, the "program for pension and benefit payments" is an operating expense of the district. The rate of levy for such operating expenses shall not exceed thirty cents on the one hundred dollars valuation pursuant to Section 321.240, supra.

Therefore, under the present law pertaining to fire protection districts in counties of the first class, the rate of tax

levy for operation costs, to include "a pension and retirement plan" "shall not exceed thirty cents on the one hundred dollar valuation."

CONCLUSION

The board of directors of a fire protection district in a county of the first class has the power to provide for the pensioning of the salaried members of its organized fire department of the district if such authority is approved as provided for in Section 321.220 (15), RSMo Cum.Supp. 1961, H. B. No. 12, Section 1, 71st General Assembly, and that by reason of Section 321.240, RSMo 1959, the rate of tax levy for such district's operation costs, to include "a pension and retirement plan" "shall not exceed thirty cents on the one hundred dollars valuation."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul A. Slicer, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

PAS:lt

INHERITANCE TAX: When a testamentary trust is created giving the beneficiary the income for life and the general testamentary power of appointment over the remainder, then the beneficiary is only subject to an inheritance tax valued upon the life estate created. The assessment of tax against the remainder is postponed until the exercise or non-exercise of the power of appointment.

OPINION REQUEST NO. 332
(Bushman)

December 13, 1962



Honorable Norman H. Anderson,
Prosecuting Attorney
St. Louis County,
Clayton, Missouri

Dear Mr. Anderson:

We are in receipt of your request for an official opinion from this office. In your letter you pose the following question:

"The basic issue involved is whether or not under Section 145.030, MRS 1959, the State is entitled to assess an inheritance tax to a beneficiary of a will based upon the entire corpus of a trust of which the beneficiary is to receive the income for life and over which the beneficiary has a general, testamentary power of appointment."

We have reviewed the information enclosed with your letter. We assume that the question asked by you is limited in scope and does not involve the problem of a trustee having the authority to invade the corpus of the trust for the benefit of the life beneficiary.

It is the opinion of this office that Section 145.030, RSMo 1959, VAMS, postpones the assessment of inheritance tax on the transfer of the property subject to the power of appointment, until such appointment is exercised or until someone becomes entitled to the possession of this property upon the failure to exercise this power. Such postponement is provided for in Section 145.110, RSMo 1959, VAMS, wherein it says that all taxes imposed under Chapter 145 are due and payable at the death of the decedent "unless otherwise herein provided for." Section 145.030, supra, reads as follows:

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"Whenever any person or corporation shall exercise the power of appointment derived from any disposition of property made either before or after the passage of this law, such appointment when made shall be deemed a transfer taxable under the provisions of this law in the same manner as though the property to which said appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by the donor by will; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this law shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power relates had succeeded thereto by a will of the donee of the power failing to exercise such power taking effect at the time of such omission or failure. The tax so imposed shall be determined by the clear market value of such property at the rate herein prescribed and only upon the excess over the exemptions herein made." (Emphasis ours).

The underlined portion of this statute should be so construed that the word "donor" means the "donor of the appointive property under the power of appointment." Thus the word "donor" should be read as "donee". In re Tompkins Estate, Mo. Sup., 341 SW 2d 866.

With this change having been made, Section 145.030, supra, can be compared with similar statutes of other states. The decisional law of other states can aid us in resolving the problem at hand.

By way of background it should be pointed out that the Tompkins case recognizes the well-established common law rule that appointive property should be treated as though it passed under the will of the donor of the power. However, the Court said, at page 872, that by enacting Section 145.030 the Legislature clearly intended to tax the "exercise" of the power of

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appointment as though the "exercise" were the transfer of property. The statute then has changed the common law rule.

Prior to 1930 New York had an Inheritance Tax Law similar to ours, rather than their present Estate Tax Law. It was from the New York law that Missouri copied its original Inheritance Tax Law. Section 145.030 appeared in the first Inheritance Tax Act of 1917. Laws 1917, page 115, Section 2. Based upon the Tompkins case construction of this statute it is identical to Vol. I, Laws New York 1897, Chapter 284, Section 220(5), page 150.

The New York Court of Appeals construed Section 220(5) of the New York Transfer Tax Act in the case of In re Delano Estate, 176 New York 486, 68 NE 871. In that case one William Astor had made conveyances in 1848 and 1849 of certain real and personal property to his daughter for life, giving her a power of appointment as to the corpus. Her power was to be exercised by will. The daughter, Mrs. Delano, died in 1902. She exercised her power of appointment in favor of her nephew, Mr. Carey. The state assessed taxes on the appointive property in the estate of Mrs. Delano. This assessment was made under the 1897 statute and Mr. Carey contested the assessment, claiming that he took title to the property under the Astor conveyances. Carey further claimed that the New York statute which postponed the taxes against appointive property did not apply because it was not enacted until after the date of the conveyances from Astor to his daughter. In holding that the tax was properly assessed in the estate of the donee, Mrs. Delano, the Court said at page 491:

"The statute, as we read it, does not attempt to impose a tax upon property, but upon the exercise of a power of appointment."

And later at page 493 the opinion stated:

"* * *As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin."

And finally at page 494:

"* * *As we said through Judge Cullen in the Dows case (167 New York 227): 'Whatever be the technical source of title of a grantee

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under the power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it.' * * * No tax is laid on the power, or on the property or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act. * * *

"It is quite immaterial that there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed and nothing else. * * *" (Emphasis ours).

Several years later this same court affirmed the Delano case in In re Vanderbilt Estate, 281 New York 297, 22 NE 2d 379. With reference to Section 220(5), the Court said at 281 New York 1. c. 309:

"The statutory rule treating the execution of the power as the real source of title is, therefore, not arbitrary; at least, so long as the tax is not measured by the size of the estate of the person who makes the transfer. Mere postponement of the assessment of the tax is not a ground for complaint to the court. That is true even though the rate of taxation might be changed in the interval between the death of the donor of the power and the death of the donee or even though in the interval the tax laws were so amended that transfers previously not taxable were subjected to a tax."

We are not unmindful of the fact that in the Tompkins case, cited earlier in this opinion, an inheritance tax was assessed and paid by the executor of the donor's estate. The court assumed that the tax previously paid was in relation to the same property

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which the state was then seeking to tax against the appointees of the donee. A comparable situation was present In re Morgan's Will, Wisc. Sup., 277 NW 650. However, as we view these cases the problem before the Wisconsin and Missouri Supreme Courts was whether the state had the power to tax the transfer of the appointive property when it passed to the appointees upon the death of the donee. The validity of the tax previously paid upon the transfer from the donor to the life beneficiary with power of appointment, was not an issue. Notwithstanding the fact that taxes had been paid upon the same appointive property, these cases held that the statute (145.030, supra and an almost identical Wisconsin statute 72.01(5) Wisc. Statutes 1933) clearly made the transfer upon the exercise of the power a taxable event. The Missouri Court said no illegal double taxation existed (1. c. 875) and the Wisconsin Court said, "If the appointees are involved here in the matter of a double taxation it seems to be a plight of their own creation." 277 NW 1. c. 652.

There may appear to be some conflict between 145.030, supra and 145.2402, RSMo 1959, VAMS. The latter section imposes a tax upon the transfer of remainders subject to certain contingencies and conditions. It reads as follows:

"When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the lowest rate which, on the happening of any of said contingencies or conditions transferring property to a natural person, would be possible under the provisions of this chapter, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of this chapter is required to pay a tax at a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in this chapter; provided

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further, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this chapter, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this chapter. Such return of overpayment shall be made in the manner provided by section 145.250, upon the order of the court having jurisdiction."

The Supreme Court of Minnesota in the case of In re Robinson's Estate, 192 Minn. 39, 255 NW 486, was called upon to construe two Minnesota inheritance tax statutes. One was virtually identical to 145.030, supra, and the other was similar to 145.240.2, supra. In that case, the decedent established a testamentary trust. She gave her daughter a life estate in the property coupled with the power of appointing by will those who were to receive the corpus upon her death. Inheritance taxes were originally assessed and paid by the life beneficiary upon the value of her life estate. A tax was also paid upon the contingent remainder, using as a basis a fictitious surviving child of the life beneficiary. When the life beneficiary eventually exercised her power of appointment in favor of her husband, the state sought an inheritance tax upon the husband's succession to the property. In deciding the question of whether the husband was liable for taxes under the appointive statute, the Court said at 255 NW 1. c. 487:

"We assume that section 2294 (similar to 145.240.2) relating to transfers 'in trust or otherwise' would cover the matter if it stood alone. But it is general in terms and must be construed with section 2292 (similar to 145.030). The latter is special and carves out of the general subject of transfers upon 'contingencies and conditions,' the one of transfers resulting from either the exercise or non-exercise of powers.

Honorable Norman H. Anderson

Hence it is controlling within its limited field as against the general terms of section 2294. Section 2292 declares expressly that an estate taken upon and by reason of the exercise of a power of appointment shall be taxable 'in the same manner as though the property * * * belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.'

The Supreme Court of Illinois has on two occasions held that their statute relating to remainders subject to certain contingencies (similar to our 145.240.2) was limited by their statute (identical to our 145.030) which postponed the taxes when the remainder interest is subject to the power of appointment. People v. Linn, 357 Ill. 220, 191 NE 450; People v. Cavanee, 368 Ill. 399, 14 NE 2d 232.

CONCLUSION

It is the opinion of this office that when a testamentary trust is created giving the beneficiary the income for life and the general testamentary power of appointment over the remainder, then the beneficiary is only subject to an inheritance tax valued upon the life estate created. The assessment of tax against the remainder is postponed until the exercise or non-exercise of the power of appointment.

The foregoing opinion which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGE:MW

SHERIFFS:
ELECTIONS:
NOMINATION TO
FILL VACANCY:
PARTY COMMITTEES:

1. An election to fill the vacancy in sheriff's office in Randolph County, Missouri, due to death of sheriff on September 4, 1962, must be held at the time of the general election in November, 1962.
2. The person elected as sheriff can qualify and assume his duties immediately after the election.
3. Each party county committee has authority to nominate a person on its party ticket to run for sheriff.
4. The names of the nominees selected by the county party committees must be on the regular general election ballot.

Opinion No. 336 (1962)

September 19, 1962

Honorable Channing D. Blaeuer
Prosecuting Attorney
Randolph County
Moberly, Missouri

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Dear Mr. Blaeuer:

In your letter of September 10, 1962, you state that a vacancy occurred in the office of the sheriff of Randolph County, Missouri, due to the death of the sheriff which occurred on September 4, 1962; that the County Court of Randolph County on September 4, 1962, made an order appointing an individual to serve as sheriff until his successor is elected and qualified. In your letter you requested an opinion concerning the following questions, to-wit:

"1. Does Missouri law require that a election be held at the time of the General Election in November, 1962, to select a Sheriff to serve the unexpired term of the deceased Sheriff?

"2. If said election is held, does the person who is elected Sheriff qualify immediately upon election, and if not immediately, then when may he qualify?

"3. Do the party committees of the County have the authority to make nominations of persons to run as candidates for Sheriff in the general election of November, 1962, and if so, whose duty is it to advise the party committees of the County of their duty to nominate and to whom do the party committees certify the names of their candidates?

Honorable Channing D. Blaeuer

"4. In the event the law requires said election to be held at the time of the general election in November, 1962, what are the duties of the County Clerk, with respect to public notice of said election, and lastly, should the names of the nominees selected by the party committees appear on a separate ballot or may they appear on a regular general election ballot?"

Concerning the first question that you have submitted, Section 57.080, RSMo 1959, provides in part as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happens more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified; * * *"

It is obvious under this above quoted statute that the sheriff must be elected at the general election in November, 1962. This statute expressly states that when a vacancy occurs more than nine months prior to the time of holding a general election, the County Court shall order a special election, but if the vacancy is less than nine months prior to a general election a person to fill the vacancy shall be chosen at the general election.

Section 1.020(3), RSMo 1959, provides:

"'General election' means the election required to be held on the Tuesday succeeding the first Monday of November, biennially;"

Certainly the election to be held this coming November is a general election.

Regarding the second question you have submitted, it is our opinion that the person who is elected sheriff to fill the vacancy for the unexpired term may qualify immediately

upon his election since he is elected to replace a person who was appointed. This statute (Section 57.080) expressly states that when the County Court has appointed a person to hold the office that he holds it until a person chosen at the general election shall be duly qualified. He is qualified when he has been elected and the County Clerk has delivered to him a certificate of his election under the seal of the County Court as provided in Section 57.010, RSMo 1959, and has executed and delivered a bond as required by Section 57.020, RSMo 1959, and caused his certificate and his official bond to be recorded in the office of the Recorder of Deeds in the county where he is elected, as provided by Section 57.070, RSMo 1959.

Concerning the third question you have submitted, Section 120.550, RSMo 1959, provides in part:

"The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

* * * *

"(3) When a vacancy in office which is to be filled for the unexpired term at the following general election shall occur after the last day in which a person may file as a candidate for nomination."

It appears clear that under this section, since the vacancy in this office occurred after the primary election which was held in August, 1962, that the party committee of the county has authority to nominate a person for the office of sheriff at the general election in November, 1962.

It must be observed that under this statute it is not mandatory for a party committee to make nominations to fill vacancies. They may do so if they so desire and there is no duty on anyone to advise a party committee of the vacancy.

Under paragraph 2 of Section 120.550, RSMo 1959, it is provided that nominations to fill a vacancy caused by death shall be filed with the election authority not later than ten (10) days before such election. Under this provision of the statute it is the duty of the party committee of the county, if they nominate a person to fill the vacancy caused by death, to file the nomination with the county clerk, who would be the election authority in this particular case.

Honorable Channing D. Blaeuer

In answer to your fourth question you have submitted, Section 120.580, RSMo 1959, provides:

"At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election; provided, that no higher rates shall be paid per inch, than is provided by section 493.030, RSMo."

It must be observed that under this section it is the duty of the county clerk at least seven days before an election to fill any public office to cause to be published the nominations of the office certified to him by the secretary of state and also those filed in his office. This would include the nominations filed by the county party committees.

Section 120.590, RSMo 1959, provides that the notice to be published by the county clerk under Section 120.580, and requires the notice to be a copy of the ballot to be voted.

Section 111.410, RSMo 1959, requires the clerk of the county court in each county to provide printed ballots for every election for public offices and to cause to be printed on the ballot the name of every candidate whose name has been certified to or filed with him. Section 111.420, RSMo 1959, provides that every ballot printed shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed.

It is our opinion that under the provisions of the above cited statutes the names of the nominees selected by the party committees must appear on the same ballot that is used at the general election for the selection of all public officials.

Honorable Channing D. Blaeuer

CONCLUSION

It is the opinion of this office that:

1. Under the law it is required that an election for the office of sheriff of Randolph County, Missouri, be held at the time of general election, November, 1962, to select a sheriff to serve the unexpired term of the sheriff who died on September 4, 1962.

2. That the person who is elected sheriff shall assume the duties as soon as he qualifies by taking the oath of office, executing a bond and recording the same with his certificate of election with the Recorder of Deeds of the county.

3. Each of the committees of the county has authority to nominate a candidate to run for sheriff on its respective party ticket at the general election, 1962, and the names of the persons who are nominated shall be filed with the county clerk by said committees.

4. That the names of the nominees selected by the party committees must appear on the regular general election ballot and not on separate ballots.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

MM:JH:BJ

September 20, 1962

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Honorable William J. Esely
Prosecuting Attorney
Harrison County
P. O. Box 104
Bethany, Missouri

Dear Mr. Esely:

This office is in receipt of your letter of September 17th, advising that the question submitted for an opinion request on September 10, 1962, was academic in view of the fact that the party appointed to fill a vacancy in the office of township collector had resigned and it would now be unnecessary to write an opinion on such request, but you would appreciate receiving any copies of opinions previously written on this matter.

As we recall the facts upon which the request was based, it referred to a township organization county where the county board had appointed the daughter of the president of the board to fill a vacancy in the office of township collector and all board members had voted in favor of the appointment.

The first question was whether the board's action violated the nepotism laws and the second question was, if this were a violation of the nepotism laws, what would be the proper procedure for removing the appointee from office?

In an opinion of this office to Honorable M. J. Huffman, Prosecuting Attorney of Wright County, Missouri, on May 31, 1935, among other matters, it was concluded that a township board member voting for a nephew by marriage or brother-in-law, violates the nepotism law, and he forfeits the right to hold office, and is entitled to no compensation.

Honorable William J. Esely

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A copy of the above mentioned opinion is enclosed,
as it is believed to fully answer your inquiries.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PNC:atp
Enclosures

COUNTY OFFICERS:
COUNTY CLASSIFICATION:
SALARIES, FEES AND
COMPENSATION:

1. The question of whether Taney County shall become a county of the third class should not be submitted to a vote of the people of Taney County at the general election on November 6, 1962.

2. The effective date of the change in salary for officials of Taney County is the first day of the year of incumbency of such officials which coincides with or is subsequent to date of the change in status of Taney County from a fourth class to a third class county, and the effective date of this change in status is January 1, 1963.

October 16, 1962

OPINION No. 340

Honorable Clifford Crouch
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Mr. Crouch:

This is in answer to your letter of September 12, 1962, in which you requested an opinion from this office.

Your letter reads as follows:

"On January 25, 1961, the Honorable Haskell Holman, Auditor of the State of Missouri, pursuant to Section 48.040, Revised Statutes, 1949, as amended, advised all Taney County officials that said County met with certain requirements for a change in county classification, and was therefore in position to become a county of third class, as provided in said section. He further advised the officials that HB 297, enacted by the 70th General Assembly, required that the question of change in county classification be submitted to a vote of the people.

"To the best of my knowledge, Christian County was the first county to act under the 1959 law. It submitted the proposition of the change in county classification to the people for their consideration; and the proposition was defeated. Subsequently, certain Christian County officials contested the constitutionality of the new law

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Honorable Clifford Crouch

in the Circuit Court in Christian County. As you are aware the Supreme Court of Missouri has just upheld the lower court's finding and has declared the 1959 statute unconstitutional.

"In view of the Supreme Court's finding, I hereby request your opinion on the following questions:

"1. Should Taney County proceed to submit the proposal of the change in county classification to the voters this November?

"2. If not, on what date did or will the salary changes for Taney County officials become effective? January, 1961? January, 1962? or January, 1963?"

In answer to your first question, it is our opinion that Taney County should not submit the proposal of the change in county classification to the voters in November, 1962. The requirement that the question be submitted to a vote of the people at a general election is contained in paragraph 2 of Section 48.030, RSMo 1959.

In the case of Chaffin v. The County of Christian et al., decided by the Supreme Court of Missouri, en banc, on September 10, 1962 (not yet reported), the Supreme Court declared paragraph 2 of Section 48.030, RSMo 1959, to be unconstitutional and void. The general rule is that an unconstitutional statute is in reality no law but is wholly void and, in legal contemplation, is as inoperative as if it had never been passed (11 Am. Jur., 827, 828, Const. Law, Section 148). There is, therefore, no requirement in the Missouri statutes that the question of change in classification of Taney County be submitted to a vote of the people at the general election in November of 1962. Such a proposal should, therefore, not be submitted.

In answer to your second question, we must consider the effect of the Supreme Court's decision in the case of Chaffin v. The County of Christian, supra, which declared paragraph 2 of Section 48.030, RSMo 1959, unconstitutional.

In 16 C.J.S., 469, Const. Law, Section 101, it is Stated:

*Reported in 359 S.W. 2d 730

Honorable Clifford Crouch

"Broadly, an unconstitutional statute is void, at all times, and its invalidity must be recognized or acknowledged for all purposes, or as applied to any state of facts, and is no law, or not a law, or is a nullity, or of no force or effect, or wholly inoperative. Generally speaking, a decision by a competent tribunal that a statute is unconstitutional has the effect of rendering such statute null and void; the act, in legal contemplation, is as inoperative as though it had never been passed or as if the enactment had never been written, and it is regarded as invalid, or void, from the date of enactment, and not only from the date on which it is judicially declared unconstitutional."

This general rule is recognized in Missouri. In the case of *Lieber v. Heil*, 32 S. W. 2d 792, the Court said:

"[1-3] Obviously, the effect of the decision of the Supreme Court in *Southard v. Short*, supra [320 Mo.App. 932, 8 S.W. (2d) 903], was to render the statute null and void, not only from and after the date of such judicial pronouncement, but even from the date of its enactment. (citing cases) In other words, the statute is now to be regarded as void ab initio, and as though it had never been in existence; and it is our constitutional duty, following the ruling of the Supreme Court, so to treat it in all matters affecting its constitutionality. (citing cases)

"All parties agree that plaintiff's cause of action grows wholly out of the statute in question, and that her suit is bottomed squarely upon it. It follows, therefore, that with the

Honorable Clifford Crouch

statute declared unconstitutional and void ab initio, she does not have, and has never had, a cause of action thereunder; and, further, that the judgment of the court rendered in the course of proceedings brought under such unconstitutional and void statute is likewise void. 12 C.J.801."

In State on Inf. of McKittrick v. Koon, 201 S. W. 2d 446, 1.c. 451, the Supreme Court of Missouri stated:

"* * * We said in State ex rel. Miller v. O'Malley [342 Mo.641, 117 S.W. 2d 324], supra: 'An unconstitutional statute is no law and confers no rights. * * * This is true from the date of its enactment, and not merely from the date of the decision so branding it'."

In view of these authorities, it is clear that paragraph 2 of Section 48.030, RSMo 1959, has no effect at all and has had no effect, even from the date of its enactment, because it is void ab initio. Therefore, the date of the change of Taney County from a county of the fourth class to a county of the third class, and the date of any concomitant change in the salaries of the officials of Taney County will be governed by the remaining provisions of Chapter 48 of the Revised Statutes of Missouri 1959.

The salary changes for Taney County officials, referred to in your opinion request, are those changes in the salaries of the county officials which would become operative upon the change of Taney County from a fourth class to a third class county. Such changes in salary will become effective upon the effective date of the change in the classification of the county, when the term of office of such officials begins on January 1. This was the gist of an opinion of this office issued on February 16, 1955, to Honorable Stephen R. Pratt, Prosecuting Attorney of Clay County, Liberty, Missouri, and a copy of that opinion is enclosed for your information. In determining the effective date of the change of salary for these officials whose term of office begins on a date other than January 1, we are enclosing a copy of an opinion of this office issued on January 27, 1955, to Honorable Stephen R.

Honorable Clifford Crouch

Pratt, Prosecuting Attorney of Clay County, Liberty, Missouri, which determines that question.

Section 48.040, RSMo 1959, makes it the duty of the state auditor to notify the county officials of the change in status of the county. The effective date of the change in status of the county is now governed by that portion of paragraph 1 of Section 48.030, RSMo 1959, which reads as follows:

"The change from one classification to another shall become effective at the beginning of the county fiscal year following the next general election after the certification by the state equalizing agency for the fifth successive year that the county possesses an assessed valuation placing it in another class. If a general election is held between the date of the certification and the end of the current fiscal year, the change of classification shall not become effective until the beginning of the county fiscal year following the next succeeding general election."

Your opinion request does not set forth the facts concerning the assessed valuation of Taney County during the past years and it does not set out the contents of the notice of the state auditor of January 25, 1961. We understand that the valuation of Taney County for the past several years has been as follows:

1955	-	9,759,801
1956	-	13,192,701
1957	-	12,524,808
1958	-	12,574,265
1959	-	12,851,643
1960	-	13,296,855
1961	-	13,802,476.

In accordance with Section 50.010, RSMo 1959, the fiscal year of Taney County begins on January 1. A general election was held in 1960 and a general election will be held on November 6, 1962 (Section 1.020(3) RSMo

Honorable Clifford Crouch

1959). Under the valuations set forth above, Taney County had a valuation in excess of ten million dollars (\$10,000,000.00) for the fifth successive year in the year 1960. Regardless of whether the certification by the state equalizing agency was made during the year 1960 or during the year 1961, the change of classification of Taney County from a fourth class county to a third class county will become effective, in accordance with the above quoted portion of paragraph 1, Section 48.030, RSMo 1959, on January 1, 1963. The effective date for any change in salary for any county official will be the first day of the year of incumbency of such official which coincides with or is subsequent to the effective date for the change in status of the county.

CONCLUSION

It is, therefore, the opinion of this office as follows:

1. The question of whether Taney County shall become a county of the third class should not be submitted to a vote of the people of Taney County at the general election on November 6, 1962.

2. The effective date of the change in salary for officials of Taney County is the first day of the year of incumbency of such official which coincides with or is subsequent to the effective date of the change in status of Taney County from a fourth class to a third class county, and the effective date of this change in status is January 1, 1963, in accordance with the notification by the state auditor and in accordance with the terms of paragraph 1 of Section 48.030, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WWW lc

2 enclosures

Note: Also see the following opinions:
Jan. 29, 1953 to Curt M. Vogel
Jan. 26, 1961 to G. B. Stewart



December 27, 1962

H. M. Hardwicke, M.D.
Acting Director
Division of Health
State Office Building
Jefferson City, Missouri

Dear Dr. Hardwicke:

You inquire as to whether Chapter 195, RSMo 1959, permits the sale of more than two fluid ounces of the described preparation to an individual for use by several members of his family when the apothecary making the sale can by reasonable diligence ascertain that the request is made in good faith, and further that records are maintained as required by Section 195.090-6.

We have located no appellate court case which answers this question. However, we believe that the question which you submit must be answered in the affirmative. We do not believe that the legislature could possibly have had in mind requiring small children to make their own purchases. At the same time the legislature did not prohibit sales for the use of children. So, if children are permitted to use these preparations, it must necessarily follow that their parents and others similarly situated must be permitted to make the purchases under the circumstances above indicated. We believe that this conclusion is supported by Paragraph 2(1) of Section 195.080, RSMo 1959, wherein it prohibits a sale if the seller "knows, or can by reasonable diligence ascertain," that such sale will provide the purchaser with an excessive amount of the drug involved.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

VOTING MACHINES:
BOARD OF ELECTION COMMISSIONERS:
ELECTIONS:

Rental charges for additional voting machines for use in St. Louis County are not required to be paid solely out of bond issue funds.

OPINION No. 343

September 26, 1962

Honorable Carroll J. Donohue, Chairman
Board of Election Commissioners
St. Louis County
Clayton 5, Missouri



Dear Mr. Donohue:

You have requested the opinion of this office as follows:

"With respect to the conduct of the General Election in November of 1962, the Board of Election Commissioners of St. Louis County does not have sufficient voting machines to enable the Board to conduct its election. The Board does have an opportunity to rent machines for the purpose of the conduct of said election and is desirous of knowing whether St. Louis County and the Board of Election Commissioners have the right to rent or lease voting machines for the conduct of a General Election with the rental or lease payments to be made from the general revenue of St. Louis County or at least from revenue sources other than the proceeds of a bond issue. It is contemplated that voting machines would be rented solely for the purpose of the conduct of the November election and that a fair rental, approved by the Board of Election Commissioners and by other appropriate officials, would be paid therefor.

Honorable Carroll J. Donohue

"This request is made because there is a varying opinion among interested parties and among various attorneys who have deliberated on this subject as to whether such rental may be paid only out of bond issue funds or whether same could be paid out of the County's general revenue or from other funds available to St. Louis County or the Board of Election Commissioners."

The question, thus, is, whether rental payments for voting machines to be used in St. Louis County in the November, 1962, election must be paid only out of bond issue funds.

Chapter 121, RSMo, authorizes the adoption of voting machines in any or all precincts in which registration is required. Section 121.010, RSMo, grants the power to adopt such machines to the "election authority." In St. Louis County, the Board of Election Commissioners is the "election authority." Section 113.050 et seq., RSMo.

Section 121.020, RSMo, makes it a prerequisite to the adoption of voting machines by the election authority that the governing body (in St. Louis County, the county council) must provide "within limitations imposed by law" for the payment of the purchase price or rental charge, or both, "as may be proposed by the election authority" and, with certain exceptions not here material, that the qualified voters of the county approve any proposed adoption of voting machines. A two-thirds majority affirmative vote is required for the approval of the proposed adoption and purchase of such machines, while a simple majority affirmative vote is sufficient for the approval of any proposed adoption and rental of voting machines. This section then expressly provides:

"An affirmative vote of the requisite majority upon any proposition to incur indebtedness to purchase or rent voting machines shall be deemed to satisfy the requirement for approval by the voters of the adoption and acquisition of

Honorable Carroll J. Donohue

voting machines."

In State ex rel Cole v. Mathews, Mo., 274 S.W. 2d 286, 288, the following facts appear:

"On February 9, 1954, pursuant to a special election held under the provisions of § 121.020, the qualified voters of St. Louis County, by a vote of more than two-thirds majority, approved the acquisition and use of voting machines and authorized the issuance of the county's bonds in the amount of \$650,000 for the purchase thereof."

Hence, by their 1954 vote, the requisite majority of the qualified voters of St. Louis County voted in favor of the policy of using voting machines in elections in said county. The voters have thereby authorized the Board of Election Commissioners to adopt voting machines in any or all precincts of St. Louis County. Whether such machines shall be used in all precincts or merely in some is for the Board to determine in the exercise of its discretion. It appears from your letter that the Board is now desirous of adopting voting machines for use in all precincts within its jurisdiction at the next general election, although the number of machines presently available is insufficient for said purpose.

In State ex rel Cole v. Mathews, supra, the question was whether the county council could interfere with the good faith discretion of the Board of Election Commissioners in determining the type or number of voting machines to be used in the county. Inter alia, the court construed Section 121.020, RSMo, and in particular that portion thereof which makes it one of the prerequisites to the adoption of voting machines in St. Louis County that the county council "must provide, within limitations imposed by law for the payment of the purchase price or rental charge, or both such rental charge and purchase price, as may be proposed by the election authority."

In that case, as the court pointed out, the voters authorized the adoption of the voting machines "and provided the funds therefor." Hence, the county council was held charged with only a ministerial duty of paying for the type and number of voting machines adopted by the Board of Election Commissioners out of the funds provided by the voters.

Honorable Carroll J. Donohue

The case did not have for consideration the question of whether the voters must specifically provide funds for the acquisition of voting machines, and we find no language therein which would warrant the conclusion that in all instances funds must be affirmatively provided by the electorate.

Section 121.020, RSMo, makes it a prerequisite to the adoption of the machines that the county council must provide "within limitations imposed by law" for the payment of rental charges and purchase price of voting machines "as may be proposed by the election authority." Hence, it is clear that it is for the county council to provide the funds "within limitations imposed by law."

Essentially, your question is whether one of the "limitations imposed by law" is that the funds be derived from a bond issue voted by the requisite majority of the voters. No such limitation is spelled out in the statute. In our opinion, so long as the necessary funds are available and not otherwise encumbered, such funds may be used to pay rental charges for the voting machines, the use of which has theretofore been approved by the voters. There is no requirement whatever in Section 121.020, RSMo, that either the purchase price or rental charges be paid only out of bond issue funds.

The provision that the vote of a requisite majority upon a proposition to incur indebtedness shall be deemed to satisfy the requirement of approval by the voters of the adoption and acquisition of voting machines, was obviously intended to avoid the necessity of requiring the voters to vote upon a separate proposition for the adoption and acquisition of the machines. It is self-evident that if the voters approve an indebtedness for the purpose of acquiring machines they thereby vote in favor of the policy that such machines be adopted and acquired for use in the county. It is equally true that the voters may approve the adoption and acquisition of voting machines without providing funds by bond issue.

In this connection we note that under the provisions of our Constitution an affirmative two-thirds majority of the voters is necessary before a county may incur an indebtedness in any year in excess of the income and revenue provided for such year, plus any unencumbered balances for previous years. Article VI, Sections 26a, 26b and 26c. Hence, a simple majority vote could not, in any event, provide

Honorable Carroll J. Donohue

any bond issue funds for the rental of voting machines.

It is evident therefore that although the necessary funds must be provided before voting machines may be acquired either by purchase or rental, it is not at all essential that such funds be bond issue funds. So long as the amount expended is "within limitations imposed by law," rental payments may be paid out of the county general revenue or from other funds, not otherwise encumbered, available to St. Louis County or the Board of Election Commissioners. There is no other restriction.

CONCLUSION

It is the opinion of this office that rental charges for additional voting machines necessary to enable the Board of Election Commissioners of St. Louis County to effectuate its desire to use such machines in all precincts of the county at the November, 1962, general election are not required to be paid solely out of bond issue funds.

The foregoing opinion, which I hereby approve, was prepared by my assistant Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN lc

Opinion No. 347, Answered by Letter
(Howard L. McFadden)

October 19, 1962



Honorable Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

This is in reference to your recent request for an opinion concerning reciprocity to be afforded an automobile (we assume you do not refer to a commercial motor vehicle of any sort) owned and licensed in Kansas by a Kansas resident but permanently kept and operated in Missouri by a Missouri resident who is the brother of the Kansas owner.

As suggested by you, 301.271 R.S.Mo. 1959 controls and reciprocity must be granted where the Kansas resident is the "owner" within the meaning of 301.010(19) R.S.Mo. 1959 if Kansas grants similar reciprocity to vehicles owned by Missouri residents and registered in Missouri. Owner in this state means:

"Owner", the term owner shall include any person, firm, corporation or association, who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law;"

Honorable Lewis B. Hoff

It means essentially the same thing under 1961 Supplement to General Statutes of Kansas 8-126(n).

Kansas does grant such reciprocity under 1961 Supplement to General Statutes of Kansas 8-138 as construed in State v. Teeslink, 177 K 268, 278 P2 591. For your information the pertinent Kansas statute is as follows:

"8-138. Registration by nonresidents.

(a) A nonresident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the state, country or other place of which the owner is a resident, and which at all times when operated in this state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fees to this state. (b) A nonresident owner of a foreign vehicle, including any foreign corporation, operated within this state for the transportation of persons or property for compensation between points within the state, shall register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state (c) Every nonresident, including any foreign corporation carrying on intrastate business within this state and owning and regularly operating in such business any motor vehicle, trailer or semitrailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state: Provided

Honorable Lewis B. Hoff

that any exemption granted in this section to nonresidents shall apply to motor vehicles owned by nonresidents only to the extent that the laws of the state in which the owner resides guarantees like exemptions and privileges to motor vehicles owned and operated by residents of Kansas, or to the extent that the proper authorities of the state in which such owner resides grant exemptions or reciprocity of privileges to motor vehicles owned and operated by residents of Kansas: Provided further, That all officers in the state of Kansas charged with the enforcement of this act shall grant to all nonresident owners of motor vehicles privileges of operation within this state equal to the privileges granted in such foreign states to motor vehicles owned and operated therein by residents of Kansas."

Yours very truly,

THOMAS F. EAGLETON
Attorney General

HM:ms

OPINION NO. 348
Answered by Letter - Burch

December 10, 1962



J. P. Russell, M.D.
Director, Hospital and Technical Services
Division of Health
Jefferson City, Missouri

Dear Dr. Russell:

Your inquiry raises the question of whether Section 199.040, RSMo 1959, applies to recalcitrant tuberculosis patients committed under Sections 199.170 to 199.270, inclusive.

Section 199.040, provides the respective counties shall be liable for the cost of free patients up to a maximum of Seven Dollars and Fifty Cents. Presently, this amount is collected from the county, deposited in the earnings fund and then appropriated as state funds for the maintenance and operation of the sanatorium during the biennium.

Section 199.250, paragraph 2, provides that:

"The expenses incurred in the care, maintenance, and treatment of patients committed to the Missouri state sanatorium under provisions of sections 199.170 to 199.270 shall be paid from state funds appropriated for the maintenance and operation of the Missouri state sanatorium."

It is our understanding that in all cases arising under the new commitment law, thus far, the county involved has paid its share as provided in Section 199.040. In other words, no distinction has been made between free patients entering the institution voluntarily and free patients committed under the new provisions.

J. P. Russell, M.D.

-2-

We believe that this procedure is correct. The legislature has provided in Section 199.040 the maximum extent of county liability for tuberculosis patients. We do not believe any distinction in this respect is indicated either in Section 199.040 or the new commitment law. Paragraph 2 of Section 199.250 does provide that expenses under the new law shall be paid from appropriated state funds. We believe this merely indicates the budgetary procedure to be followed and does not modify the obligation of the county as to free patients who may have become recalcitrant.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CB:ap

1962

FILED
349

Honorable John Hosmer
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Hosmer:

With reference to your recent request for an opinion concerning the regulation of the funeral business in this state it is the opinion of this office that Chapter 333, RSMo 1959, clearly purports to regulate only the art of embalming and not the conduct of funerals in general.

The provisions of Section 357.010, RSMo 1959, authorizing the formation of cooperative companies, set out, expressly, the purposes for which such cooperatives may be formed. The conduct of the funeral business is not among them.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLMc:sr

October 9, 1962

FILED
352

Honorable Paul L. Bell
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Mr. Bell:

This department is in receipt of your recent request for a legal opinion reading in part as follows:

"The County Court of Crawford County has requested that I obtain an opinion as to whether or not they are legally obligated under Chapter 279.030 of Missouri Revised Statutes to continue to pay bounties, in spite of the fact that they have received a notice that the State Treasury cannot refund two-thirds of the bounties paid, because there is insufficient unencumbered balance in the appropriation covering the period from February 5, 1962 through June 25, 1962."

Initially, as you know, pursuant to Section 28, Article IV, Constitution of Missouri, 1945, as amended 1958, and Section 33.170, RSMo 1959, no warrant can be paid by the state treasurer to any county upon satisfaction of the requirements of Section 279.030, RSMo 1959, unless there is in the appropriation for such purpose an unencumbered balance sufficient to pay said bounties. Your inquiry evidences that there has been no such unencumbered balance since February 5, 1962, and that therefore the "State Treasury cannot refund two-thirds of the bounties paid" by the counties as provided for in Section 279.030, supra, until further funds are appropriated by the General Assembly for such purpose.

In answering your question as to "whether or not they (the county court) are legally obligated under Chapter 279.030 of Missouri Revised Statutes to continue to pay bounties, in spite of the" state's inability to repay the counties at present, it is our view that since the Legislature specifically stated in Sections 279.010, RSMo Supp. 1961, and 279.030, supra, that the bounties shall be paid, the county court is "legally obligated * * * to continue to pay bounties, * * *"

It would be well to note at this point that Section 279.010, supra, further provides that "* * * the county court may by unanimous vote after holding a public hearing on the matter reduce any of these bounties by such amount as it finds advisable. * * *"

In concluding, we would suggest that pursuant to Section 279.030, supra, the clerk should among other requirements continue to certify to the state comptroller the amount of bounty paid by the county so that the county could be repaid out of any further funds appropriated by the General Assembly for that purpose.

A somewhat similar question was raised and conclusion reached in an opinion of this office under date of July 27, 1955, issued to Honorable J. Marcus Kirtley, a copy of which is enclosed.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PAS:lt
Enclosure 1

(Opinion #356 answered by letter, by General Eagleton 9-25-62)

September 25, 1962



Honorable E. J. Cantrell
Member, Missouri House of
Representatives
Third District
St. Louis County
3406 Airway
Breckenridge Hills, Missouri

Dear Mr. Cantrell:

I have your opinion request regarding the City of Overland (4th Class City, non-charter).

Basically, you asked two questions. First, is it legal for residents of Overland to petition the Board of Aldermen? Second, can the Board of Aldermen enact an ordinance which would place on the ballot a certain question?

As to your first question, the answer is in the affirmative. As to your second question, the answer is in the negative.

A citizen's right of petition is "inalienable." I, as Attorney General, am petitioned almost every day in terms of the mail I receive. Likewise, a member of Congress, or a member of the General Assembly, or a member of the Board of Aldermen. This "petition" need take no precise form and can consist of an individual letter, or a document signed by many individuals. There is no precise mode of procedure by which such a "petition" is to be received, accepted, or filed.

With respect to the right of a fourth class city to place on the ballot a proposition by way of referendum, I call your attention to an opinion of this office which was issued to Representative Young on December 1, 1961 (copy enclosed).

Honorable E. J. Cantrell

-2-

As you will note from reading this opinion, there is no statutory authority for such a procedure. Also, in passing, I call your attention to a landmark case entitled Mills v. Sweeney, 114 N.E. 65, which deals with this proposition.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TFE:lt

Enc 100-1961

COUNTY ZONING:
COUNTY PLANNING COMMISSION:
COUNTIES OF THIRD AND FOURTH CLASS:

The County Zoning Commission
has no authority over areas
within an incorporated municipality.

December 27, 1962



Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Wilson:

In your letter of September 24, 1962, you submit the following question:

"I enclose herewith a copy of The Zoning Order of Platte County, Missouri. You will note that this Order covers only the unincorporated portion of the county, and follows Section 64.620, Revised Statutes of Missouri, which Section, it appears to me, provides authority for such Order only as to the unincorporated portion of the county. I am having a little difficulty in reconciling this Section and fitting it in with Section 64.510, Revised Statutes of Missouri, 1959, which your opinion holds is the controlling Section. If Section 64.510 is the controlling Section, is there authority to amend our present Zoning Order so as to include incorporated areas within a municipality that has not enacted a city plan, keeping in mind the fact that Section 64.620 makes provision for Order covering only unincorporated portion of the county?"

In your letter you mention the fact that we issued an opinion on January 26, 1962, to you concerning certain provisions

Honorable Robert P. C. Wilson, III

of the county planning and zoning statutes. In that opinion we stated that under the provisions of Section 64.510, Mo. Cum. Supp. 1961, incorporated areas within a municipality that has not enacted a city plan should be included in the county master plan. You now inquire whether incorporated areas within a municipality may be included in the county zoning plan.

We believe the difficulty in placing a proper construction on the statutes dealing with county planning or zoning is the result of not recognizing the distinction existing between planning and zoning as those terms are used in the statutes governing this matter.

Section 64.510, Mo. Cum. Supp. 1961, provides that the county court in certain class counties after the approval by a vote of the people may provide for the preparation and adoption of a county plan for "all areas of the county outside the corporate limits of any city, town or village, which has adopted a city plan in accordance with the laws of this state".

Section 64.550, RSMo 1959, provides for the appointment of a county planning commission, designates certain persons that shall be appointed as members of the commission, and specifies certain other matters pertaining to said commission.

Section 64.550, RSMo 1959, defines the powers and authorities of the county planning commission and provides in part:

"The county planning commission shall have the power to make, adopt and publish an official master plan of the county for the purpose of bringing about coordinated physical development in accordance with the present and future needs. The official master plan shall be developed so as to conserve the natural resources of the county, to insure efficient expenditure of public funds and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants. Such official master plan may include, among other things, studies and recommendations relative to the location, character, and extent of highways, railroads, bus, streetcar, and other transportation routes, bridges, public buildings, schools, parks, parkways, forests, wildlife refuges, dams, and projects affecting conservation of natural resources. * * *"

Honorable Robert P. C. Wilson, III

Attention must be called to the statutory provisions as to what may be included in the county master plan. Generally, it consists of those things of a public nature, such as roads, bridges, and so forth, that affect the public generally. As stated in our opinion of January 26, 1962, we believe that under the statutes, the incorporated areas within a municipality that has not enacted a city plan should be included in the county master plan. This includes only those matters that are within the jurisdiction of the county planning commission.

Section 64.620, RSMo 1959, provides in part:

"For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties of the second or third class to conserve and protect property and building values, to secure the most economical use of the land, and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county court of any county to which sections 64.510 to 64.690 are applicable as provided in section 64.510 shall have power after approval by vote of the people as provided in section 64.530 to regulate and restrict, by order of record, in said unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas for agriculture, forestry, and recreation."

Section 64.630, RSMo 1959, provides, in part, for the division of the unincorporated areas of the county into districts and provide that within such districts the erection, construction, reconstruction, alteration, repair, relocation, or maintenance of buildings or structures and use of land and lots may be regulated and restricted. It further provides that the regulation shall be made in accordance with "a comprehensive zoning plan".

Section 64.640, RSMo 1959, provides, in part, that in counties that do not have a county planning commission, the county court may appoint a county zoning commission. In those counties that have a county planning commission, it acts also as a county zoning commission.

Honorable Robert P. C. Wilson, III

Section 64.650, RSMo 1959, provides in part for the county court in any county that has adopted a zoning plan to appoint an officer to enforce the plan.

Section 64.610, RSMo 1959, provides for the creation of a Board of Adjustments to hear complaints concerning planning regulations. Section 64.660, RSMo 1959, provides for the appointment of a county board for zoning adjustment.

Attention is called to these different statutes to show that planning and zoning are treated as separate and distinct matters under the statutes. Some of the statutes govern county planning and other statutes apply only to county zoning. It must be noticed that the statutes that relate to county zoning expressly provide that they apply only to unincorporated areas.

CONCLUSION

It is our opinion that the county zoning commission or the county planning commission, acting as a zoning commission, has no authority insofar as zoning is concerned in areas within an incorporated municipality even though such municipality has not enacted a city plan.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

MM:lt

December 7, 1962

OPINION REQUEST NO. 360 answered by letter

The Honorable M. E. Morris
Director of Revenue
P.O. Box 629
Jefferson City, Missouri



Dear Mr. Morris:

This is in answer to your letter dated September 26, 1962, requesting an opinion from this office. Your letter reads as follows:

"This Department desires an opinion with regard to Section 143.180 as it affects the applicable dividend credit percentage as referred to herein, and for the purpose of our request we quote the pertinent portion of Section 143.180:

"For the purpose of this chapter, the tax on income included in the return of any stockholder of any corporation, joint stock company and/or joint stock association, received or earned during the taxable period, shall be credited with the amount obtained by multiplying the rate of the Missouri state tax on corporate income by the amount or portion of such dividends, or net earnings of any corporation, joint stock company and/or joint stock association, upon which such corporation, joint stock company and/or joint stock association, paid income tax to the state of Missouri for its last preceding taxable period.'

The Honorable M. E. Morris

"While it is noted that the stockholders income shall be 'received or earned during the taxable period,' it is also noted that the corporation's dividend credit shall be calculated on the basis of 'its last preceding taxable period.'

"For the purpose of clarifying this request, a stockholder received dividends during the calendar year 1961 from a corporation whose income tax returns are filed on a fiscal year ending January 31st. It has long been our view that, in this instance, the last preceding taxable year of the corporation was for the fiscal year ending January 31, 1960, since it was the last corporate year preceding the beginning of the individual stockholders taxable period of January 1, 1961. Likewise similar view was taken on all 1960 corporate fiscal year endings including the 1960 calendar year.

"Your opinions are requested on the following situations:

"A: As in above example should the dividend credit percentage applicable to receipt of dividends during the calendar year 1961 be calculated on the last preceding corporation income tax return ending fiscal or calendar prior to January 1, 1961 which is the first day of the stockholder's period?

"B: A corporation is newly incorporated in 1960 so that its first Missouri Corporation Income Tax Return is filed for the fiscal year ending January 31, 1961. This corporation paid dividends to its stockholders during the year 1960 and also in January 1961. The corporation, therefore, had 'no last preceding taxable year'. Since stockholders would therefore file Missouri Individual Income Tax Returns for both 1960 and January 1961 for dividends received in these respective periods, please advise the basis to be used for determination of the dividend credit percentage applicable in accordance with your opinion on situation A above.

The Honorable M. E. Morris

"C. Would the answers to situations A and B above be the same if, instead of a corporation fiscal year ending January 31, 1961, the corporation had any subsequent 1961 fiscal year ending?"

Your request hinges on an interpretation of what the Legislature meant by the phrase "for its last preceding taxable period." The statute itself does not elaborate on this nor are there any Missouri case decisions on this point. Webster's International Dictionary defines "preceding" as "to go before in order of time; to be earlier than, to occur first with relation to anything." "Preceding" is defined by Black's Law Dictionary as "next before". It would therefore appear from the plain wording of the statute "that the last preceding taxable period" referred to in Section 143.180, RSMo 1959, can only refer to the taxable period next before that of the taxpayer. The taxpayer's taxable period is the subject matter of this chapter and the word "preceding" as used in this section, can only relate to that.

It is from this premise that the three situations as outlined in your letter are answered. It is the opinion of this office that they should be resolved as follows:

A. In answer to the situation as outlined here, the dividend credit should be allowed on the last preceding corporation income tax return ending in the fiscal or calendar year prior to January 1, 1961, as this is the first day of the taxpayer's period.

B. In the situation outlined here it is the opinion of this office that this taxpayer would not be allowed any dividend credit on his 1960 return as there was no "preceding taxable year", nor could this taxpayer claim any dividend credit on his 1961 return as again there were no dividends from this corporation "in the preceding taxable year", since the end of the corporation's fiscal period occurred during the taxpayer's period. The first dividend credit could be claimed by this taxpayer on his 1962 return.

C. In this situation our answer would be the same regardless of when the corporation had its fiscal year ending. The only criteria is that the fiscal year ending of the corporation be the one immediately preceding the commencement

The Honorable M. E. Morris

of the taxpayer's period.

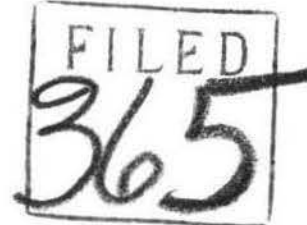
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert D. Kingsland.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

RDK:im

December 17, 1962



Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Scott:

This is in answer to your letter of October 12, 1962, requesting an opinion of this office regarding whether road commissioners in counties organized under Chapter 233, Sections 233.010 to 233.165, may hire out road machinery for grading in other districts.

We enclose herewith an opinion of this office given on February 16, 1954, to the Honorable Garner L. Moody, Prosecuting Attorney of Wright County, in which we held that a township in a county under township organization was not empowered to use township machinery to do work for private individuals for hire. We believe the reasoning and conclusion given in this opinion would apply equally to the question you asked.

However, Section 233.105 RSMo 1959 provides as follows:

"1. Said boards may repair, grade, gravel, macadamize, pave or otherwise improve to the distance of fifteen miles from any line of such special road district, any highway outside of such district if the same be a prolongation of an improved street or highway in said district and if liberal contributions toward such improvements be made in money, material or labor by the inhabitants interested in such improvements or the county court or

Honorable Rufe Scott

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December 17, 1962

any special road district organized under the laws of this state, or the state highway board, or the United States government, or by any one or more of the foregoing.
* * *

It is our opinion that under the provisions of this section the road commission could hire out its equipment to a contiguous road district to improve highways in such district that are a prolongation of an improved street or highway in its own district.

However, otherwise than under the circumstances set out in Section 233.105, it is our opinion that the road commissioner may not allow district machinery to do work in other districts for hire.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JHD: sr
Enclosure

DIVISION OF WELFARE: Division of Welfare may reimburse
WELFARE DEPARTMENT: City of St. Louis 50% of expenditures
SURPLUS COMMODITIES: incurred by it in issuance of Food
Stamps.

Opinion No. 367

October 15, 1962



Mr. Proctor N. Carter
Director
Division of Welfare
State Office Building
Jefferson City, Missouri

Dear Mr. Carter:

In your letter of October 3, 1962, you requested an opinion from this office as follows:

"Senate Bill No. 147 was enacted by the 71st General Assembly relating to the distribution of surplus agricultural commodities and provided, in part, that the Division of Welfare should reimburse any county or city not within a county in an amount equal to 50% of the sum expended by the county or city for the acquisition, warehousing and necessary cold storage, safekeeping, maintenance of proper records and distribution of surplus agricultural commodities during the preceding month; provided the expenditure had been approved by the Division of Welfare. This legislation was enacted with an emergency clause referring to the prevalent need for surplus agricultural commodities which the Government of the United States is making available for distribution.

"It has been decided to discontinue direct surplus commodities distribution in St. Louis City and substitute therefor what is known as a "Pilot Federal

Mr. Proctor N. Carter

Food Stamp Program". Under this program it is planned that the Division of Welfare will certify persons or households eligible to receive food stamps and that the City of St. Louis will be responsible for the issuance and accountability of food stamp coupons. The food stamp program is for the purpose of encouraging the domestic consumption of agricultural commodities and products thereof, by increasing their utilization among welfare recipients and low income groups.

"QUESTION: Under Senate Bill No. 147 can the Division of Welfare reimburse the City of St. Louis in an amount equal to 50% of the sum expended by the City in the issuance of Federal Food Stamps?"

You have also forwarded to this office certain rules and regulations promulgated by the Secretary of the United States Department of Agriculture and identified as Part 540, Pilot Food Stamp Program of Chapter V, Title 6 of the Agriculture Marketing Service.

The general purpose and scope of the Pilot Food Stamp Program set out in Section 540.1 in the rules and regulations, hereinafter referred to as the regulations, is to encourage the domestic consumption of agricultural commodities and products thereof by increasing their utilization among lower income groups. In general these regulations provide for the Department of Agriculture to furnish to a city or county coupons or food stamps which are to be redeemed in exchange for food in the manner as set out in said regulations. The regulation further provides that the State Public Welfare Agency shall act as the certifying agency of eligible households to the local agency of the county or municipal government that will be responsible for the issuance of coupons to the eligible households. Those households now receiving assistance under the federally-aided programs of Old Age Assistance, Aid to Dependent Children, Aid to the Blind, and Aid to the Disabled are eligible to participate in this program for benefits in addition to what they are now receiving. Other persons or households may also be eligible if approved by the State Welfare Agency.

The rules also provide the manner in which the food stamps are to be accepted by the retail or wholesale food stores in exchange for food and for the redemption by the

Mr. Proctor N. Carter

local banks of the food stamps from the merchants and finally by the Secretary of Agriculture and the Treasurer of the United States.

The ultimate purpose of this food stamp program as disclosed by these rules and regulations is to increase the consumption of agricultural products, thus reducing the surplus of agriculture commodities and one of the methods which the Secretary of Agriculture has adopted for this purpose is the use of food stamps as provided for under the rules and regulations promulgated by his department. It is also clear that under these regulations it will be necessary for the county or municipal agency acting as the issuing agency under this program to keep records and to account for the use and disposition of all stamps received by the agency.

House Bill No. 147, 71st General Assembly, Laws of Missouri, 1961, page 510, provides in part that any county and the City of St. Louis may establish a program for the acquisition, storage, and disposition of surplus agricultural commodities to needy persons pursuant to the Act of Congress of the United States. It further provides that the Division of Welfare and the Department of Public Health and Welfare shall make and promulgate necessary regulations for the administration of the program and for the certification of the eligibility of the recipients of the commodities. It further provides:

"(3) The division of welfare of the department of public health and welfare shall, on or about the fifteenth day of each month reimburse any county or city not within a county in an amount equal to fifty per cent of the sum expended by the county or city for the acquisition, warehousing and necessary cold storage, safekeeping, maintenance of proper records and distribution of surplus agricultural commodities during the preceding month; provided the expenditures have been approved by the division of welfare."
(Emphasis ours.)

It should be noted that under the above statute, the Division of Welfare is authorized to reimburse a county or the City of St. Louis up to 50% of the cost of maintenance of proper records and the distribution of surplus commodities.

You state in your letter that it has been decided to discontinue direct surplus commodity distribution in St. Louis and to substitute therefor the Pilot Federal Food

Mr. Proctor N. Carter

Stamp Program. In order to do this the City of St. Louis will under the rules and regulations referred to herein act as issuing agency and as such will be responsible for the issuance and distribution of the food stamps to those persons or families who are certified by the State Division of Welfare as eligible to receive them. In order to do this it will be necessary for the City of St. Louis to maintain and keep an accurate record of all food stamps received by it in order that an accurate accounting can be made as to the use and distribution of such stamps. It would appear that the keeping of such records would be a necessary and valid expense in the administration of the program and that the Division of Welfare under the above cited statute has authority to reimburse the City of St. Louis up to 50% of the cost of the keeping and maintenance of said records, provided the expenditures have been approved by the Division of Welfare.

CONCLUSION

It is the opinion of this office that under Senate Bill No. 147 of the 71st General Assembly the Division of Welfare has authority to reimburse the City of St. Louis in an amount equal to 50% of the sum expended by the City in the issuance of federal food stamps under this program.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Moody Mansur.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

MM:MS:BJ

October 15, 1962



Honorable John F. Hayner
State Representative
11th District, Jackson County
203 North Main Street
Independence, Missouri

Dear Mr. Hayner:

This refers to your letter of October 1, 1962, requesting opinions concerning three matters.

As we understand the situation, your first inquiry, concerning the present status of political party city committees in Independence, and your second inquiry, concerning the nomination of candidates for school director in the Independence school district, both result from the false premise that the nomination of candidates for director in the Independence school district is governed by Section 165.315, RSMo 1959, which reads in part as follows:

"1. In any school district in a third class city now or hereafter having more than thirty-five thousand inhabitants, candidates for school directors may be nominated by a majority of the members-elect residing in the school district of each political party committee of the city in which the school district is located."

Section 165.315 was originally enacted in 1955 for the specific purpose of regulating elections in the Independence school district. However, in an opinion furnished to John W. Mitchell on August 25, 1960, a copy of which is enclosed, this office expressed the view that that section was not applicable to the Independence district under the then existing facts because the district was not wholly within the city. As matters now stand, Section 165.315 is not applicable to the Independence district for another reason, namely, because Independence, by adopting a city

charter, ceased to be a third class city and became a constitutional charter city.

Since Section 165.315 is no longer applicable, the situation with respect to the election of directors in the Independence district is the same as it was prior to the enactment of that section in 1955; and, as stated in the above-mentioned opinion furnished to Mr. Mitchell, such elections are governed by Section 165.330, RSMo 1959. As you will note from reading Section 165.330, that section does not provide for the nomination of candidates for director, and we do not know of any other statutory provision applicable to the Independence district which does so. Enclosed herewith are copies of opinions furnished to Michael J. Doherty on November 10, 1954, and to N. A. King on March 18, 1938, relating to candidates for school director in comparable circumstances.

We believe that your third inquiry, concerning the applicability of Section 120.220, RSMo 1959, to Independence, will be answered by calling attention to Section 82.180, RSMo 1959, which reads as follows:

"All cities which have heretofore adopted charters pursuant to section 16, article IX, of the Constitution of Missouri of 1875, or may hereafter adopt charters pursuant to section 19, article VI of the Constitution of Missouri of 1945 shall have power by charter enactment to prescribe the manner in which nominations shall be made for municipal offices in such cities and the form of ballot to be used at elections for municipal offices in such cities."

With further reference to your first inquiry, we perhaps should note that, in view of your statements concerning the manner of election of city officials under the Independence city charter and the fact that Section 165.315, RSMo 1959, is not applicable to the Independence school district, it is not apparent to us that there are any

Honorable John F. Hayner

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governmental functions to be performed by a political party city committee in Independence.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB le
3 enclosures

OPINION NO. 370
Answered by Letter - Northcutt

December 21, 1962



Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Wilson:

As a follow-up to the telephone conversation between yourself and Mr. Northcutt this morning, in regard to your request of October 4th for an opinion of this office, it is our opinion that the questions which you have asked are at this time moot, and therefore, we decline to answer them.

The basis upon which we come to the conclusions that the questions presented are moot is that Section 57.250 provides that the Circuit Judge shall make an order permitting the sheriff to appoint deputies and assistants, and the order also shall fix their compensation. In other words, the sheriff must receive the approval of the Circuit Judge for the appointment of all deputies and assistants and the Circuit Judge must make a specific order as to the deputies and assistants.

Therefore, until the Circuit Judge has made such approval, the sheriff may not appoint such assistants or deputies and the County Court may not pay such assistants and deputies.

I hope that this letter, in connection with our telephone call this morning, satisfactorily takes care of this problem.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

RRH:ap

Opinion No. 376
Answered by letter

October 16, 1962



Mr. George E. Schaaf, Attorney
St. Louis Board of Election Commissioners
7751 Carondelet
Clayton 5, Missouri

Dear Mr. Schaaf:

We have your request for an opinion relative to a factual situation involving absentee voting in St. Louis County.

Your letter states that there are 65 Roman Catholic Nuns at Visitation Academy who belong to a Papal Cloistered Group and cannot leave their premises without permission of Rome, since they are a Papal Order. At the last primary election, all of these Nuns were permitted to vote by absentee ballot on the theory that, realistically considered, they were "absent" to the same extent as if they were in some other country.

Sections 112.010 to 112.120 RSMo "provide a method of voting by voters absent from their county, or prevented by illness or physical disability from going to the polls to vote on election day."

Section 1.090 RSMo provides that "words and phrases shall be taken in their plain or ordinary and usual sense." The word "absent," as ordinarily used, means "not present" or "being away from a place." That the word may have been used in this frame of reference could be inferred from the fact that it is part of the phrase "absent from the county."

However, it is possible, within the meaning of some statutes, to be "absent from the county" even though the

person involved is physically present therein. An example of such a situation is afforded by the Kentucky case of Dark Tobacco Growers Co-operative Ass'n. v. Wilson, 257 S.W. 1092, which construed a statute empowering the clerk of a court to grant a declaratory injunction if the judge of the court be absent from the county. In that case, the judge had disqualified himself. In these circumstances, it was held that the judge was "absent from the county" within the meaning of the statute.

In the later Kentucky case of Northcutt v. Howard, 279 Ky. 219, 130 S.W.2d 70, the court agreed that the Commonwealth's attorney is "absent" in legal effect when he is either disqualified or, for some reason, disabled from performing the duties of his office. And in Bingham v. Cabbot, 3 U.S. 19, 1 L.Ed. 491, the court held that, although a district judge was on the bench, yet if he did not sit in the cause, he was "absent in contemplation of law."

Under the statute, the right to cast an absentee ballot is given, not only to those absent from the county, but also to those who "through illness or physical disability" are prevented from personally going to the polls. There is no claim that the Nuns in question are ill, so that the only remaining question would be whether they are under a "physical disability" which would prevent them from personally going to the polls.

By the phrase "physical disability" is ordinarily meant an incapacity caused by a physical defect or infirmity, or a bodily imperfection. Such is undoubtedly the sense in which the term is used in Section 111.590 RSMo, which provides a means of voting for a person who "by reason of physical disability is unable to mark his ballot." However, it may well be that the phrase "physical disability" is broad enough to cover the situation described in your letter.

Because of the restraints imposed upon them, the Nuns in question are deprived of the ability to leave their cloister and, therefore, incapable of personally going to the polls. Such disability, in our view, is not mental, because the latter would ordinarily connote weakness of mind and lack of understanding. In this case, the restraint imposed upon the Nuns is upon their bodies, even though such restraint has resulted from the vows they have taken; and hence the disability might conceivably be deemed "physical."

Militating against such a construction of the phrase "physical disability" is the fact that the word "illness" is joined with such phrase by the conjunction "or." And prior to the amendment of this statute in 1959, a physician's (or Christian Science practitioner's) supporting certificate was required to be attached to the application of every voter who expected to be prevented from going to the polls through illness or "disability." But on the other hand, the very fact that the requirement of such a certificate has now been affirmatively omitted by the amendment might well evidence a legislative intent to broaden the meaning of "physical disability," so that it should not necessarily be of a character which could be certified to by a doctor or Christian Science practitioner.

In our view, the statutory provisions relating to absentee voting, like other provisions of election laws, "must be liberally construed in aid of the right of suffrage." To this effect are cases such as *Application of Lawrence*, 353 Mo. 1028, 185 S.W.2d 818, 820. In this connection, consideration should also be given to the provisions of Article I, Section 7, of our Constitution, which provides in part that "no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Hence, the absentee voting law should be liberally construed in such manner as not to discriminate unfairly against persons who, because of their religion, are prevented from personally going to the polls to vote.

The responsibility of ruling upon a challenge to a particular absentee ballot is ultimately that of the courts, after a hearing in which the facts are fully developed. Because of the uncertainty inherent in the application of the law to the facts of cases such as described in your letter, we have concluded that it would be inadvisable for this office to issue an official opinion with respect thereto, but trust that the views expressed in this letter will be of help in resolving the problems with which you may be confronted.

Yours very truly,

JOSEPH NESSENFELD
Assistant Attorney General

JN:sr

NOTICE:
PUBLICATION:
BOND ISSUE:

Notice for bond issue in Adair County should be published in a newspaper once during the week of October 21 to October 27, 1962, and once during the week of October 28 to November 3, 1962.

OPINION No. 379

October 18, 1962

Honorable Vance R. Frick
Prosecuting Attorney
Adair County
Kirksville, Missouri

FILED
379

Dear Mr. Frick:

This is in reply to your letter of October 15, 1962, in which you request an opinion of this office as follows:

"The other day you will recall I talked to you concerning the fact that our County Court has petitioned to submit a \$700,000 Bond Issue at the General Election for the construction of a Nursing Home. This has been petitioned for under Chapter 108, Section 040 of the Missouri Revised Statutes of 1959, and was just turned in last week. Since that time, the County Court has been checking over the petitions to determine whether all the signers are qualified electors and tax payers of Adair County.

"The question that the County Court has posed to me and wanted me to check with your office was whether or not there would be sufficient time to publish the necessary notices and to vote on this matter in November."

In answering your opinion request, we assume that the petitions are proper and have been signed by a sufficient number of qualified electors of Adair County. We also assume that there is a newspaper of general circulation published in Adair County.

We refer you to the last portion of Section 108.040, RSMo 1959, which reads as follows:

Honorable Vance R. Frick

"* * * Upon the presentation of such petition it shall be the duty of the county court of such county to order that an election be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state."

Section 108.050, RSMo 1959, provides for the notice of such election and reads as follows:

"The clerk of the court shall give notice of the election by advertisement once per week for two consecutive weeks in one or more newspapers of general circulation published in such county, or if there is no newspaper published in such county, then by posting written or printed handbills in two public places in each voting precinct in the county for fourteen days prior to the day fixed for the election. Such notice shall state the time and purpose of the election and the amount of indebtedness to be incurred."

A general election will be held in Adair County on November 6, 1962 (Section 1.020(3) RSMo 1959). Your question then concerns the notice which must be given in order to submit the bond issue proposal to the voters at the general election on November 6, 1962. Under the provisions of Section 108.050, RSMo 1959, quoted above, this notice must be given "by advertisement once per week for two consecutive weeks in one or more newspapers of general circulation published in such county."

In the case of *Ratliff v. Magee*, 165 Mo. 452, 65 S.W. 713, 1.c. 714, it is said:

"* * * 'Once a week' means once in a

Honorable Vance R. Frick

week; once at any time within the
week. * * *

In the case of State ex rel. Kelsey v. Smith, 75 S.W. 2d 832, the Supreme Court of Missouri construed the statute under consideration prior to its amendment to its present form. At page 833 the court quoted with approval from a previous case holding,

"* * * 'that the particular four weeks designated were those regular calendar periods, of seven days each, beginning on Sunday, and occurring next before the Tuesday of election day, and that a publication in each of those periods was what the constitution required'."

In this case of State v. Smith, supra, the Court held that publication once in each of the required three weeks was sufficient compliance with the statute, even though the period from the date of the first publication to the date of the election was less than 21 days.

In accordance with these authorities it is our opinion that the notice should be published in the newspaper at least once during the week of October 21 to October 27, 1962, inclusive, and once during the week of October 28 to November 3, 1962, inclusive.

CONCLUSION

It is, therefore, the opinion of this office that the notice under Section 108.050, RSMo 1959, for a bond issue which is to be submitted to the voters of Adair County at the general election on November 6, 1962, should be published in a newspaper of general circulation in Adair County at least once during the week of October 21 to October 27, 1962, and at least once during the week of October 28 to November 3, 1962.

The foregoing opinion, which I hereby approve, was prepared by my assistant Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

December 5, 1962

OPINION NO. 381

Answered by letter - Northcutt.

Mr. Bernard W. Gorman
Prosecuting Attorney
Atchison County
Court House
Rockport, Missouri



Dear Mr. Gorman:

In answer to your request of October 16, 1962, for the opinion of this office as to the application of Opinion #217-1962, (copy enclosed) to the County Court or Treasurer, as well as to the School Board as stated in said opinion, it is the position of this office that since a County Superintendent of Schools is included within the term and definition of the word "teacher" contained in Section 169.010, that the opinion would apply as well to the County Court or Treasurer.

We have taken this position in answer to several other requests, and we are taking this position in a case which is before the courts at the present time.

I believe that this letter will adequately answer your question along with a re-reading of Opinion #217-1962.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

RRH:ap
Enc.

ATTORNEY GENERAL'S OPINION

SCHOOL DISTRICTS: Teachers' salaries must be paid from fund provided in Sec. 165.110, RSMo 1959. In school districts in this state not in cities that have a population of 75,000 or more, teacher is retired July 1 next after attaining age 70 and may thereafter teach only under provisions of Sec. 169.560; school board may not legally pay teacher's salary from fund provided in Sec. 165.110 past July 1 next after teacher has reached age 70 except under provisions of Sec. 169.560; school board may not legally contract with teacher who is retired by provisions of Sec. 169.060 except under provisions of Sec. 169.560.

SCHOOL TEACHER

RETIREMENT AGE:

TEACHERS' FUND:

SUBSTITUTE TEACHER:

Opinion No. 217 (1962)

July 25, 1962

Honorable Arthur B. Cohn
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Cohn:

This is in reply to your letter of May 14, 1962, requesting an opinion from this office in answer to the following question:

"If the school board hires a teacher who is of the retirement age, to-wit: 70 years of age, can the school board legally pay her salary from the regularly appropriated teachers fund or must her salary be paid from a different fund?"

Section 169.010, paragraph 6, defines "teacher" as follows:

"Teacher" shall mean any teacher, teacher-secretary, substitute teacher, supervisor, principal, supervising principal, superintendent or assistant superintendent, school nurse, or librarian who shall teach or be employed by any public school, state college or state teachers' college on a full-time basis and who shall be duly certificated under the law governing the certification of teachers; any county superintendent of schools, assistant county superintendent of schools and those employed by county superintendents of schools upon a full-time basis and who shall be duly certified under the law governing the certification of teachers; and the state superintendent of

Honorable Arthur B. Cohn

public schools or commissioner of education, persons employed in the state department of education or by the state board of education in an executive capacity and other persons employed by said state board of education on a full-time basis who shall be duly certificated under the law governing the certification of teachers; and persons employed by the board of trustees of the public school retirement system of Missouri on a full-time basis who shall be duly certified under the law governing the certification of teachers; provided that this clause shall not be construed to include employees of the University of Missouri or Lincoln University."

For our purpose the above definition of the term "teacher" is sufficient and is adopted for the purposes of this opinion.

Having defined the term "teacher", we must now determine in what manner and from what source a teacher in Missouri may legally be paid, and in this connection we find that disbursement of all school money is governed and controlled by Section 165.110, RSMo 1959, which has contained within it specific references to teachers. This section provides that all teachers' salaries must be paid out of the specified teachers fund. The statutes are completely silent as to any other legal method of payment of teachers' salaries.

As may be seen from the above, teachers' salaries may be paid only from the authorized teachers fund as provided by Section 165.110, RSMo 1959, supra; however, it does not answer the question of whether a teacher, age seventy or over, may be paid from this fund. To do this it is necessary to turn to other statutes and determine whether there is an age limit beyond which a person may not teach. If there is a legally established age limit beyond which a person may not teach it would follow that any payment to such person would be an illegal payment of public funds and therefore prohibited.

We turn in this regard to Chapter 169, RSMo 1959. Sections 169.010 to 169.130, inclusive, provide for the retirement of teachers in school districts of less than seventy-five thousand. The districts embraced within this act are set out in Section 169.020, RSMo 1959, as follows:

" * * * The system so created shall include all school districts in this state, except those in cities that had populations of seventy-five thousand or more according to the latest United States decennial census,

Honorable Arthur B. Cohn

and such others as are or hereafter may be
included * * *

The above section includes the Waynesville district because it is not a district in a city of more than seventy-five thousand.

Section 169.050, RSMo 1959, provides in part that:

"* * * all employees as herein defined of districts included in the retirement system thereby created shall be members of the system by virtue of their employment."
(underscoring added)

"Employee" is defined by Section 169.010, RSMo 1959, as synonymous with "teacher". Therefore, by operation of this chapter "teachers" are members of the retirement system by virtue of their employment.

The above sections make membership in the public school retirement system of Missouri and employment as a teacher dependent one upon the other and bound together. Membership in the retirement system is a legal qualification for a "teacher".

Section 169.060, RSMo 1959, provides that a member (which by operation of Section 169.050 includes teachers) of the public school retirement system of Missouri must retire upon reaching age seventy by the following provision:

"* * * a member shall be retired automatically
on the first day of July next following the
school year in which he reaches the age of
seventy years,* * *" (underscoring added)

Therefore, the phrase "shall be retired automatically" directs that the individual member has no choice or volition as to whether he will or will not continue as a member of the retirement system and thereby, as a teacher, he is retired by operation of the statute.

It may be seen that by the enactment of Section 169.060, RSMo 1959, the Legislature intended that retirement or withdrawal from active service as a member of the retirement system was to be mandatory upon said member and upon July first next after reaching the age of seventy years a member is by law rendered incapacitated to continue in active teaching service in the public schools contained within the retirement system.

We may further illustrate the fact that a "teacher" may not teach beyond July 1 following the attainment of age seventy by reading Section 163.080, RSMo 1959, which provides as follows:

"The board shall have power, at a regular or

Honorable Arthur B. Cohn

special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; * * *" (underscoring added)

In connection with the above quoted portion it may be seen that one of the legal qualifications for a "teacher" is membership in the retirement system as provided by Section 169.050, supra. It would follow that when a "teacher" is retired by operation of Section 169.060, RSMo 1959, supra, the "teacher" is no longer legally qualified and therefore, by operation of Section 163.080, supra, the school board would have no authority to contract with and employ the "teacher", and any payment to such "teacher" would be an illegal payment of public funds and therefore prohibited.

It will be noted that the absolute retirement of "teachers" at age seventy is modified to the extent that a retired teacher over age seventy may serve as a substitute teacher not to exceed sixty days in any one school year by the provisions of Section 169.560, RSMo 1959.

CONCLUSION

Therefore, it is the opinion of this office that:

1. A school board may not legally pay a teacher's salary from a fund other than the teachers fund provided by Section 165.110, RSMo 1959.
2. In school districts in this state not in cities that have a population of seventy-five thousand or more:

A. A "teacher" is automatically retired July first following the attainment of the age of seventy years and may not thereafter actively engage in teaching in public schools, except under the provisions of Section 169.560 as a substitute teacher;

B. A school board may not legally pay a teacher's salary from the teachers fund created by Section 165.110, RSMo 1959, beyond July first next after the teacher has attained seventy years of age, except under the provisions for a substitute teacher as contained in Section 169.560;

C. A school board may not legally contract with and employ a "teacher" who is retired by the provisions of Section 169.060, RSMo 1959, except under the provisions of Section 169.560 regarding substitute teachers.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert R. Northcutt.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

RN:BJ

CONSTITUTIONAL LAW: 1. A final declaration that a statute is un-
COMPENSATION: constitutional renders the statute void from the
COUNTY COLLECTORS: date of its enactment.
COUNTY OFFICERS: 2. The result of the decision declaring Section
48.030-2 unconstitutional is that all counties
which except for the subdivision would have become
third class counties on Jan. 1, 1961, shall be deemed to have become
third class counties on that date.
3. Any change in the salary or fees of county
officials of Christian, McDonald and Wright counties resulting from
the transition shall become effective in 1961 on the date corre-
sponding to the beginning of the term of such officials. Excess
fees retained since the first Monday in March, 1961, may be recovered
from the county collectors of these counties.

November 2, 1962

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri

FILED
382

OPINION NO. 382

Dear Mr. Holman:

This is in answer to your request for an opinion of this
office on the following matters:

"Pursuant to a conversation with members
of this office we would appreciate a
reply to the following questions, as the
result of the Supreme Court Ruling in
Case No. 49073 (Joe N. Chaffin vs. The
County of Christian, et al.), in connec-
tion with the change of classification
of counties from fourth to third class.

"The assessed valuation of Christian
county was over \$10,000,000.00 for the
years 1954 through 1961 and McDonald and
Wright Counties assessed valuations were
each over \$10,000,000.00 for the years
1955 through 1961.

1. Having met the requirements of
Section 48.030, RSMo 1949 and subsection
1, Section 48.030, RSMo 1959, are these
counties deemed to be counties of the
third class as of January 1, 1961?

2. Are all existing statutes govern-
ing counties of the third class appli-
cable to these counties as of January 1,
1961?

Honorable Haskell Holman

" 3. Shall all salaries and fees as provided by existing statutes for officers of a third class county, even though the officers salaries may be increased or decreased due to change of county classification, be in effect as of January 1, 1961?

4. Shall these counties as well as other counties that have met the requirements to become third class counties on January 1, 1963 be renotified of their change in classification?"

Section 48.020, RSMo 1959, divides the counties of Missouri into four classes, based upon their assessed valuation at the time of enactment. Section 48.030, subdivision 1, provides:

" * * * no county shall be deemed as moving from a lower class to a higher class or from a higher class to a lower class until the assessed valuation of the county is such as to place it in the other class for five successive years. * * *

Section 48.030, subdivision 2, purports to impose an additional requirement for the change of fourth class counties to third class counties, in that:

" * * * no county of the fourth class shall become a county of the third class until the question is submitted to a vote of the people at a general election, and a majority of the electors voting on the question shall vote in favor thereof. * * *

In the case of Chaffin v. Christian County, No. 49,073, decided September 10, 1962, not yet reported, the Supreme Court of Missouri, en Banc, declared Subdivision 2 of Section 48.030 unconstitutional. The Court further declared: " * * * under the valid statutes presently existing Christian County

Honorable Haskell Holman

is a county of the third class and that plaintiff is entitled to be paid his salary as treasurer of a third class county."

The effect of a final decision that a statute is unconstitutional is to render the statute null and void, not only from and after the date of such judicial pronouncement, but from the date of its enactment. Such a statute shall be regarded as void ab initio and as though it had never been in existence. Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178; Lieber v. Heil, (1930) Mo.App., 32 S.W.2d 792; State v. O'Malley, (1938) Mo., 117 S.W.2d 319; State v. Koon, (1947) Mo., 201 S.W.2d 446, 451, 11 Am.Jur., Constitutional Law, §148; 16 C.J.S., Constitutional Law, §101.

As a result of this decision, all counties having met the requirements of Section 48.030 RSMo 1949, and Section 48.030, Subdivision 1, RSMo 1959, and which would have become counties of the third class January 1, 1961, except for the provisions of Section 48.030, Subdivision 2, shall be deemed to have become third class counties on that date. According to your letter three counties, Christian, McDonald and Wright, so qualify, and therefore must be considered as having become third class counties on January 1, 1961. We assume the notification prescribed by Section 48.040 was given each of these counties. In answer to your fourth question, while we do not believe a renotification to be required, it is our opinion it would be wise to do so to avoid any question being raised. It should be emphasized that it is a renotification and that, as a result of the decision in Chaffin v. Christian County, supra, the county so notified became a county of the third class on January 1, 1961.

Statutes providing for salaries and fees of all officers of third class counties became applicable to Christian, McDonald and Wright Counties on January 1, 1961. Any change in the compensation of officers of these counties whose statutory term of office begins on the first day of the year following their election would become effective on the date of the change of classification, January 1, 1961. This is the gist of an opinion of this office issued on February 16, 1955, to the Honorable Stephen R. Pratt, Prosecuting Attorney of Clay County, Liberty, Missouri, a copy of which is enclosed herewith. In an earlier opinion to Mr. Pratt issued on January 27, 1955, a copy of which is enclosed, we concluded that a change in the salary of officials whose term of office does not begin on the first day of the year, such as the county assessor, whose term begins on September 1st (Section 53.010), shall not take place on January 1st, but on the date

Honorable Haskell Holman

corresponding to the beginning of his term of office.

It is our understanding the salaries and fees of all county officers except the county collector are increased upon the transition of a fourth class county to a third class county. Thus, other than county collectors, all officers whose term of office begins on the first day of January following their election are entitled to the amount of such increase from the date of change, January 1, 1961. All such officers whose term of office begins on a date other than January 1st are entitled to an increase beginning in 1961 on the date corresponding to the date of the beginning of their term of office. The amount of such increase should be paid as soon as possible as such amounts were, as a matter of law, included in the county budget, *Gill v. Buchanan County*, (1940) Mo., 142 S.W.2d 665, and, if necessary, the discretionary amounts listed in the county budget should be reduced in order to pay these statutorily included budget figures.

Regarding county collectors, their basic compensation is prescribed by Sections 52.260 and 52.280. It is not affected by a change in the classification of a county. However, collectors in fourth class counties may retain one per cent of all current taxes collected as compensation for mailing tax statements and receipts. Collectors in third class counties receive only one-half of one per cent of all current taxes for these services, Section 52.250. The county collectors holding office in 1961 were elected in 1958, and their term expired the first Monday in March, 1962. Therefore, the county collectors of Christian, McDonald and Wright Counties are entitled to retain not more than one-half of one per cent of all current taxes collected since the first Monday in March, 1961. In *State v. Ludwig*, (1959) Mo., 322 S.W.2d 841, our Supreme Court, en banc, held that excess commissions voluntarily paid to or retained by a public officer out of public funds, in good faith, under a mistake of law, may be recovered by the State. The fact that the money was retained by virtue of the provisions of a statute later declared unconstitutional does not relieve the official of the liability for the funds wrongfully withheld. He will have withheld a portion of the taxes to which not only the county but also the State of Missouri is entitled, and it is our opinion both county and State have the right to recover such portion of the taxes so retained by the collector, irrespective of his good faith. However, only the excess commissions retained by the collector after the first Monday in March, 1961, may be recovered.

Possible methods of recovery of funds wrongfully withheld were enumerated by the Court in *State v. Ludwig*, supra, which said, 1. c. 850:

Honorable Haskell Holman

"If an official retains fees or commissions which he is not entitled to receive they may be recovered in an action for money had and received (Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857), they may be allowed by way of recoupment in a mandamus proceeding (State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532), or, in the absence of a valid defense to the claim, in a summary proceeding such as this. 84 C.J.S., Taxation, §670, p. 1348; 67 C.J.S., Officers, §§101, 123(b), pp. 364, 416."

The summary method referred to is that prescribed by Section 139.250.

Recovery of the excess commissions retained by the county collectors may be made at this time under any of the theories set out in State v. Ludwig, supra. The cause of action did not arise prior to the date of the first report of the county collector following the first Monday in March, 1961, and is not barred by any statute of limitations.

We do not herein decide that all existing statutes governing counties of the third class are applicable to the three counties in question as of January 1, 1961. If you have any questions pertaining to specific statutes or factual situations, we will be glad to try to answer them.

CONCLUSION.

The declaration by the Supreme Court that Subdivision 2 of Section 48.030 RSMo 1959 is unconstitutional renders such statute void from the date of its enactment. All counties which would have changed from counties of the fourth class to counties of the third class on January 1, 1961, except for the requirements contained in this subdivision, shall be deemed to have become third class counties on that date. All statutes prescribing the salaries and fees of county officials shall become applicable to such counties on that date. The salaries and fees of such county officials whose term of office begins on the first day of the year following the date of their election shall be changed beginning January 1, 1961. The change of the salaries and fees of all county officials whose term of office begins on a date other than on the first day of the year following their election shall begin

Honorable Haskell Holman

in 1961 on the date corresponding to the date of the beginning of their term of office. This rule is applicable to both increases and decreases in the compensation of such county officials.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John H. Denman.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JHD:sr

Enclosures

PROBATION AND PAROLE: Section 216.355, RSMo 1959, provides for the
VOTER, QUALIFICATIONS: issuance of a certificate evincing the
JUROR, QUALIFICATIONS: restoration of all the rights of citizenship
CIVIL RIGHTS, by the Board of Probation and Parole to
RESTORATION: persons convicted of a first felony who are
finally discharged from parole. Said section
does not entitle any person convicted of more
than one felony to such a certificate whether
the felony for which he was previously
convicted was committed within or without the
State of Missouri.

October 31, 1962

Opinion No. 384 (1962)

Honorable George N. Elder
Chairman
Board of Probation and Parole
Jefferson Building
Jefferson City, Missouri

FILED
384

Dear Mr. Elder:

This is in response to your request for an opinion from
this office relative to the restoration of civil rights to
first offenders when they are discharged from parole.

More particularly, your request is stated as follows:

"Section 216.355, Paragraph 3, RS Mo 1959,
deals with the automatic restoration of
citizenship to all first offenders at the
time of their discharge from parole. We
have had the question raised as to whether
or not a prior felony committed in another
state or under Federal jurisdiction, when
the offender was placed on probation, would
count as a prior felony against a Missouri
parolee at the time of his discharge from
parole.

"As an example, we have a case of a man who
was placed on probation on a Federal charge.
After his discharge from this probation he
became involved in another felony in the
State of Missouri, and was sentenced to the
Missouri penitentiary. He was subsequently
paroled. He has had no other felony con-
victions. When his parole time expires and
his final discharge is issued, will he be
entitled to a certificate of restoration of
citizenship under the provisions of Section
216.355, Paragraph 3, RS Mo 1959?"

Honorable George N. Elder

A complete review of the statutes of this state wherein civil rights are taken away from persons convicted of various crimes is not necessary here, but it is advisable to note that not all civil rights are taken away from persons convicted of all felonies. However, it must be noted that under Section 494.020, RSMo 1959, all convicted felons are prevented from serving on juries unless their civil rights are restored, and, under Section 111.060, RSMo 1959, no person convicted of a felony or of a misdemeanor connected with the exercise of the right of suffrage may be permitted to vote unless he has been granted a full pardon. (Suffrage may also be restored after discharge from parole as explained in *State vs. Hunt*, 247 S.W. 2d 969.) Invariably these two paramount rights of citizenship are mentioned in the multitudinous statutes setting out the various crimes for which conviction will constitute a forfeiture of certain civil rights. There are other civil rights which are also sometimes denied convicted felons, perhaps most typified in Section 560.610, RSMo 1959, wherein, in addition to the above, persons not under the age of twenty when convicted of certain crimes enumerated in Chapter 560 are prevented from holding any office of honor, trust or profit. In the past, but long since repealed and not applicable here, convicted felons were held incompetent to testify in court.

As stated in *State vs. Hunt*, supra, where a judicial parole statute was under consideration (now Section 549.170, RSMo 1959) wherein the said statute purporting to restore civil rights after discharge from parole was attacked as being an encroachment upon the Governor's power of pardon, the court stated that it was within the power of the legislature to grant such amnesty and the same was not an unconstitutional encroachment upon the pardoning powers of the Governor. There it was made clear that it was in the interest of society as a whole and the state in particular to encourage rehabilitation of convicted felons by holding out to them the promise of restoration of civil rights upon their continued good behavior. The court made this distinction: that the power of the Governor to pardon is the power of grace whereas the power to parole is one of public policy in providing an incentive to reformation and rehabilitation. Therefore, it would seem that a liberal interpretation of the statute with the idea in mind of granting the amnesty wherever possible would be desirable.

However, we are confronted with other equally compelling decisions of the Supreme Court of this state upon this issue which are directly in point and which indicate that the court

Honorable George N. Elder

deems convictions in other jurisdictions to be applicable in these instances. In the case of State vs. Hermann, 283 S.W. 2d 617, decided by our Supreme Court, en banc, in October of 1955, there was under consideration the qualification of a juror who had failed to disclose upon voir dire examination the fact that he had previously been convicted of a felony in the federal court. The court held that this constituted conviction of a felony within the meaning of the statutes of this state setting out the qualifications for jurors even though the conviction did not occur within this jurisdiction. We may only assume that the same principle would be applied to the statute here under consideration (Section 216.355, RSMo 1959), referring to the restoration of civil rights to first offenders upon their discharge from parole.

The same result was reached by our Supreme Court, en banc, in 1943 in the case State ex rel Barrett et al vs. Sartorius, 175 S.W. 2d 787, as regards the right to vote of a person convicted of a felony in the federal court, wherein the court stated with reference to the constitutional grant of power to the legislature to restrict the voting right:

"This is a broad grant of power in very general terms. There are no limitations in it which indicate an intention to require our General Assembly to restrict exclusion from the right of voting to those convicted of a felony under the laws of this state. * * *"

This last above quoted statement is particularly apt in the instant inquiry because it must be noted that the legislature in enacting Section 216.355, RSMo 1959, did not employ language restricting the application of the section to persons convicted of felonies in this state alone. Therefore, we deem the pertinent section to restrict the Board of Probation and Parole, in the issuance of its certificate of restoration of civil rights upon discharge from parole, to those persons who have only been convicted of one felony and such a certificate cannot be granted to any person who has been convicted of more than one felony regardless of where convicted.

CONCLUSION

Section 216.355, RSMo 1959, provides for the issuance of a certificate evincing the restoration of all the rights of citizenship by the Board of Probation and Parole to

Honorable George N. Elder

persons convicted of a first felony who are finally discharged from parole. Said section does not entitle any person convicted of more than one felony to such a certificate whether the felony for which he was previously convicted was committed within or without the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant Howard L. McFadden.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLH:BJ

October 29, 1962



Honorable Joe H. Miller
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Mr. Miller:

This is in response to your recent request of this
office for an opinion as follows:

"I enclose an affidavit of absentee
voter which shows the flap where it
can be sealed. Should a ballot be
returned to the County Clerk with
this sealed down and reinforced with
Scotch tape or cellophane tape, is
it possible that such a ballot could
be challenged due to the fact that
it was not properly sealed?"

The only pertinent statutory provision we find
controlling upon this issue is Section 112.050, RSMo
1959, wherein it is stated: "The ballot or ballots shall
then in the presence of the officer be deposited in the
envelope and the envelope securely sealed." We deem this
to mean the envelope must be securely sealed, and since
there is no statutory provision as to what manner must be
employed in securely sealing the envelope we do not
believe that the ballot could be held invalid or success-
fully challenged because of the fact that it is sealed
and the seal then overlayed with cellophane tape.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLM:BJ

October 30, 1962

394

Honorable A. J. Anderson
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Mr. Anderson:

This is in response to your letter of October 25, 1962, wherein you enclose a letter from Mr. Carl D. Gum, Jr., City Attorney for the City of Belton, Missouri, requesting an opinion of this office regarding the results of diverting tax money collected under Sections 71.640 and 71.670, RSMo 1959, providing for the establishment of a band concert fund by cities, towns and villages.

We presume that you make this request concerning the duties which may devolve upon your office as Prosecuting Attorney and reply with that presumption in mind.

Although Section 71.670, RSMo 1959, provides, "No voluntary contribution, donation, or diversion into another fund shall be made from this fund in any manner whatsoever." we do not find any penalty provision within that chapter if such a diversion is made. Therefore, we deem that Section 558.260, RSMo 1959, bearing upon fraudulent disbursement of money by certain public officials generally to apply. If there is a fraudulent diversion of the funds as set out in the statutory provision last above mentioned then prosecution would be warranted. However, it must be noted that this penalty provision contains the following proviso:

"provided, however, that in any case when any money has been or shall have been collected by any city, town or county for any specific use or purpose, and it is or shall have become impossible to use such money for that specific purpose, either by reason of the abandonment or failure of

Honorable A. J. Anderson October 30, 1962

such use or purpose, or the satisfaction of such use or purpose, then the members of any such town or city council, and the proper officers of such city, town, county or board herein mentioned, may appropriate such money to any other legitimate use or purpose without becoming liable to any of the aforesaid penalties."

We believe, therefore, that where it can be shown that there has been a legitimate abandonment of the purpose for which the tax money was collected or a failure of the project or if the purpose for which the money has been collected is deemed to be satisfied, then the public officials involved cannot be successfully prosecuted for diverting the remaining funds to some other legitimate public purpose.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLM:BJ

OPINION REQUEST 395
answered by Letter.

October 31, 1962

FILED
395

Honorable Maurice Schechter
State Senator, 13th District
41 Country Fair Lane
Creve Coeur 41, Missouri

Dear Senator Schechter:

This refers to your letter of October 25, 1962, inquiring whether the City of Crestwood, Missouri, may establish a pension or retirement plan for police and firemen to be wholly funded through an insurance company.

Section 86.583, RSMo 1959, is applicable to Crestwood both because that city is located in a county of the first class (St. Louis County) and because it falls within the 3,000 to 100,000 population bracket according to the 1960 federal census. Section 86.583 reads as follows:

"Any municipality in any county of the first class, and any other municipality in this state which now contains or may hereafter contain not more than one hundred thousand inhabitants nor less than three thousand inhabitants as determined by the last preceding federal census is hereby authorized to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of deceased members; provided, however, that nothing in this section shall be construed to affect any pension or retirement system for members of an organized police force or fire department, and their widows or minor children, which has been established previously under authority of an act of the general assembly and which is in operation at the time of the passage of this section, and the provisions of law applicable to any

such pension or retirement system shall not be deemed to be repealed or superseded by the provisions of this section. This section shall not take effect in any such city until approved by the voters thereof as herein provided. On order of the city council, or on petition of five per cent of the qualified voters of said city, the city clerk shall publish notice thereof and submit to the qualified electors of said city at the next general or municipal election the question: 'Shall the police or firemen's pension plan be approved?' If a majority of the voters casting votes thereon at the election is in favor of the question, this section shall take effect in said city thirty days after the election. Notice of every such election under this section shall be published at least once a week for at least three weeks in a newspaper of general circulation in said city, the last publication to be not more than three nor less than two weeks next preceding the election."

You will note that Section 86.583 authorizes a city such as Crestwood, upon a favorable popular vote, to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of deceased members but that that section does not purport to regulate in any manner the pension plans which may be created pursuant thereto. In view of the unrestricted authority granted by Section 86.583, we know of no reason why provision for the pensioning of police and firemen pursuant to that section could not be accomplished by an arrangement with an insurance company.

While an insurance company was not involved, you may possibly be interested in the enclosed copy of our letter of May 17, 1962, to Representative H. F. Patterson concerning the Police and Firemen's Retirement fund created by the City of Columbia pursuant

Honorable Maurice Schechter

3

to Section 86.583.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

1 enclosure

CRIMINAL COSTS:
SUSPENDED SENTENCE:
PROBATION AND PAROLE:
LIMITATIONS OF CLAIMS
AGAINST STATE:

(1) Where imposition of sentence is suspended, state is not liable for costs unless and until defendant is thereafter sentenced to penitentiary.

(2) Costs for which state is liable after final judgment include costs incident to revocation of probation granted when imposition of sentence is suspended.

(3) Liability of state accrues upon final judgment and sentence, even if sentence is imposed more than two years after conviction.

Opinion No. 396

December 13, 1962

Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol Building
Jefferson City, Missouri



Dear Mr. Trigg:

You have requested an opinion of this office as follows:

"We respectfully request your official opinion in regard to three questions on parole cases where imposition of sentence is suspended.

"Section 550.020 RSMo 1959 requires the state to pay certain costs in some cases. Court Rule 27.07, Section C, allows the court 'to place on probation any defendant eligible for judicial parole under the laws of this state and, to this end may suspend the imposition or execution of sentence of any such person,' Sec. 549.190.

"Our first question is: If a person is convicted of a certain crime punishable solely by imprisonment in the penitentiary and the court suspends the imposition of sentence and places the defendant on probation, is the state liable for the costs?

Honorable Charles D. Trigg

"Our second question is: If this defendant has his probation revoked and is sentenced to the penitentiary at the time his probation is terminated, is the state liable for the costs of the original trial (i.e. when the imposition of sentence was suspended), or the costs of the revocation hearing or both or neither? Section 33.120 requires persons having claims against the state to exhibit them within two years after such claims shall accrue, and not thereafter.

"Our third question is: If this defendant is placed on probation and imposition of sentence is suspended then after two years have elapsed the probation is revoked and the defendant is sentenced to the penitentiary, does the state pay any of the costs of the trial or revocation hearing or both or neither?"

Section 550.020 RSMo provides in part that "in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary * * * the state shall pay the costs * * *."

246.020
550.020
The language of Section 550.020 is plain and unambiguous. There is no liability on the part of the State to pay any costs thereunder unless and until the defendant has actually been sentenced to imprisonment in the penitentiary. The fact that the sole punishment for the offense of which a defendant has been convicted is imprisonment in the penitentiary is immaterial in determining the liability of the State. It is only in those instances in which the defendant has been acquitted that the punishment for the offense charged is of consequence, and that is for the purpose of determining whether the State or the county is to be held liable for the costs. Section 550.040 RSMo. Hence, if the court suspends the imposition of sentence under the authority of Supreme Court Rule 27.07(c) [Section 549.190 RSMo], then the State cannot be liable for the costs unless thereafter sentence in the penitentiary is imposed.

Supreme Court Rule 27.07(c) authorizes the trial court to "place on probation any defendant eligible for judicial

Honorable Charles D. Trigg

parole under the laws of this state and, to this end, may suspend the imposition or execution of sentence of any such person." Section 549.080 RSMo provides in part that when a person of previously good character who has not been previously convicted of a felony shall be convicted of any felony (except certain designated felonies) "and sentence shall have been pronounced", the court before whom a conviction was had may parole such person. In our opinion, a defendant is eligible for judicial parole and therefore may be placed on probation and the imposition of his sentence suspended if: (1) he is of good character, (2) has not been previously convicted of a felony, and (3) has been convicted of a felony other than those expressly excepted by Section 549.080. The further requirement that "sentence shall have been pronounced" pertains only to the authority of the court to grant such parole and is not a condition of "eligibility" for judicial parole within the meaning of Supreme Court Rule 27.07(c). Any other conclusion would be self-defeating. Obviously, the imposition of sentence cannot be suspended if sentence has already been pronounced, and neither the Supreme Court in Rule 27.07(c) nor the Legislature in Section 549.190 could have intended to require the impossible (pronouncement of sentence) as a condition to suspending the imposition of such sentence.

There can be no question but that under Section 550.020 the State is liable for all of the costs of the original trial once sentence has been pronounced. The specific question posed by your letter involves the costs pertaining to revocation of probation with the imposition of sentence to the penitentiary following. On several occasions, our courts have held that the granting of a parole is no part of the trial of the cause and is not an incident to the conviction. See State ex rel. Browning v. Kelly, 309 Mo. 465, 274 SW 731, and State v. Merk, Mo. App., 281 SW2d 607. The basis of such rulings is that after the judgment and sentence, the case has been finally disposed of, and that the granting of the parole is a matter separate and apart from the case itself.

In State v. Gordon, 344 SW2d 69, 71, our Supreme Court stated:

"A suspended sentence is 'a suspension of active proceedings in a criminal prosecution. It is not a final judgment * * *.'"

In the situation presented by your letter, the defendant has not been sentenced, and the case therefore has not been concluded

Honorable Charles D. Trigg

or finally disposed of. There is no "final determination of the cause" and the judgment is not final. Therefore, opinions of this office which hold that the State is not liable for costs incident to the revocation of a parole are not in point for the reason that in the situations there discussed, sentence was pronounced and the judgment was final.

Under the express language of Section 550.020, the State is liable for the costs of every case in which the defendant is convicted and sentenced to the penitentiary. It follows, therefore, that if the defendant is placed on probation prior to the imposition of sentence, and this probation is subsequently revoked, that all costs incident thereto are part of the costs of the case, and that the State is liable therefor. That is, all costs prior to final judgment are costs for which the State is liable within the meaning of Section 550.020.

The liability of the State for costs accrues when sentence is pronounced, so that in the situation presented in your letter, when probation is revoked and the defendant is sentenced to the penitentiary, the two year period for certifying the fee bill for payment would start to run at the time of final judgment and sentence. The mere fact that sentence is imposed more than two years after the defendant is placed on probation and the imposition of sentence suspended would not affect the liability of the State for all the costs in the case, including those of the original trial.

CONCLUSION.

It is the opinion of this office that the State is not liable for costs in a criminal case where the imposition of sentence is suspended and defendant placed on probation unless and until probation is revoked and the defendant has been sentenced to the penitentiary; that the liability of the State for such costs includes costs incident to the revocation of probation as well as the costs of the original trial; and that the fact that sentence is imposed more than two years after sentence was originally suspended does not affect the liability of the State for the payment of costs, so long as the fee bill is certified within two years after the imposition of sentence.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:sr

OPINION No. 400
answered by letter.

November 1, 1962



Honorable Eugene S. Heitman
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Heitman:

We have your letter of October 26, 1962, in which you request an opinion of this office on the effective date of the change of the status of Bollinger County in the classification of counties. We assume that the question is prompted by the case of Chaffin v. The County of Christian et al., decided by the Supreme Court of Missouri, en banc, on September 10, 1962 and reported at 359 S. W. 2d 730.

You did not send the figures concerning assessed valuation of Bollinger County in your letter and I have obtained from the state auditor's office the following figures concerning the assessed valuation of Bollinger County:

1956 -	10,016,543
1957 -	9,977,418
1958 -	10,432,910
1959 -	10,767,665
1960 -	11,145,177
1961 -	12,208,997

In answer to your question I am enclosing a copy of an opinion of this office issued on October 16, 1962, to Honorable Clifford Crouch, Prosecuting Attorney, Taney County, Forsyth, Missouri.

Section 48.030, RSMo 1959, requires the assessed valuation of the county to be such as to place it in another class for five successive years before the

change can become effective. Since the assessed valuation for Bollinger County dropped below \$10,000,000 in 1957, there are now only four successive years of valuation in excess of \$10,000,000. Any change in the classification of Bollinger County will depend upon the amount of the assessed valuation for the year 1962. When the assessed valuation for the year 1962 is determined I am sure you can then determine the effective date of the change in status of the county, in accordance with the procedures or rules set forth in the enclosed opinion to Honorable Clifford Crouch of October 16, 1962.

If you have any further questions we will be happy to help you in any way we can.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

WWW lc

1 enclosure

OPINION No. 401
answered by letter.

November 14, 1962

401

Mr. Francis M. Linek, President
Missouri State Board of Accountancy
217 State Capitol
Jefferson City, Missouri

Dear Mr. Linek:

This is in response to your recent inquiry as to whether a person not licensed as a public accountant may use the word "accounting" on his stationery and in his advertising. You also advise that the person concerned "indicates that he is a public accountant," apparently in his advertising.

We forward herewith an opinion issued by this office at the request of the Honorable Jay White under date of November 20, 1953, which holds, in part, that the word "auditing" may not be used in advertising by a person not licensed to practice public accounting. The reasoning upon which that conclusion is based is that the use of the word "auditing" in a business name amounts to an indication "that such person is entitled to practice as a public accountant . . ." as proscribed by Section 326.030, RSMo 1959.

Having reached such a conclusion with respect to the word "auditing," we must certainly take the same view as to the use of the word "accounting."

In this connection, we also invite your attention to Section 326.010(1), RSMo 1959, which prohibits any unlicensed person from holding "himself out to the public, in any manner, as one who is skilled in the knowledge, science and practice of accounting, and as qualified and ready to render professional service therein as a public accountant for compensation; . . ." Advertising which, as you say, "indicates that he is a public accountant,"

Mr. Francis M. Linek

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would certainly seem to fall within the prohibition of this statute.

Accordingly, we hold that a public representation by an unlicensed person that he performs accounting work constitutes a violation of the statutes regulating the practice of accounting in this state. See Section 326.120(6), RSMo. 1959.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS lc

1 enclosure

Copy to: Honorable Henry F. Koch
Mayor, City of Florissant
619 St. Francis Street
Florissant, Missouri

GASOLINE TAX
CITIES, TOWNS AND
VILLAGES
CITY COLLECTOR

City collectors are not entitled to a commission for any alleged "collection" of gas tax since the State of Missouri collects the tax and has been compensated for such collection.

OPINION REQUEST NO. 403
(Bushman)

November 5, 1962

Manuscript

Honorable John M. Dalton
Governor of Missouri
Executive Office
Jefferson City, Missouri



Dear Governor Dalton:

Several weeks ago you forwarded to this office a letter addressed to you by Mr. R. S. "Pat" Patterson, City Clerk of Malden, Missouri. Mr. Patterson's letter is as follows:

"This letter concerns the State Gas Tax:

"Our Ordinance reads that the City Collector shall receive a commission of 4% on all monies due and coming to the City of Malden, Mo.

"There seems to be a question as to whether our Ordinance covers this gas tax. I claim that it is a tax and should be handled the same as any other tax money collected by the City Collector, and she should receive her commission.

"Please advise."

You referred Mr. Patterson's letter to this office for our opinion. After corresponding with Mr. Patterson, we obtained a copy of the Malden ordinance which provides for the city collector of Malden to receive a 4% commission "for his services in collecting any and all revenue due and owing to the City of Malden, Missouri, which he is authorized and entitled to collect * * *."

By way of background, I think it is necessary to draw your attention to the special language found within the recently enacted gas tax amendment, Art. IV, Sec. 30(a) (b), Missouri Constitution, 1945. At Sec. 30(a) 1, it is stated:

"On and after the first day of the month next following the adoption of this section, a tax upon or measured by fuel used for/propelling highway motor vehicles shall be levied and collected as provided by law. Any amount of the tax collected with respect to fuel not used for propelling highway motor vehicles shall be refunded by the state in the manner provided by law. The remaining net proceeds of the tax, after deducting costs of collection, apportionment and making refunds shall be apportioned between the counties, cities and the state as hereinafter provided and shall stand appropriated without legislative action for the following purposes: * * *."
(Emphasis ours).

If any city official receives gas tax money from the Department of Revenue, then that money should be deposited to the credit of the city. The city collector should not deduct any amount from these revenues as a commission for "collection" since in fact and in law he has not collected the city's gas tax. The previously quoted Constitutional amendment empowers the state to collect the gas tax; the money has been collected by the state; and the state has been compensated for this collection.

Since the Collector is not authorized to collect gas tax revenues, nor constitutionally could he be authorized to collect gas tax revenues, then he is not entitled to receive any compensation on receipt of the city's gas tax check.

CONCLUSION

It is the opinion of this office that under the new gas tax constitutional amendment the State of Missouri shall

Honorable John M. Dalton

#3

collect the tax and the cost of such collection is to be subtracted from the gross proceeds. The Director of Revenue shall forward the city's allocated share to the city and no further alleged cost of collection can or should be deducted.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGB:mnw

Opinion Request No. 407
answered by letter.

November 16, 1962

FILED
407

Honorable Harold L. Miller
Prosecuting Attorney
DeKalb County
Maysville, Missouri

Dear Mr. Miller:

This refers to your telegram requesting an opinion concerning the question whether absentee ballots in the November 6 election which were delivered to the county clerk by persons other than the voters (and not by mail) should be counted.

Reference is made to Mr. Baumann's telephone conversation with you today concerning this matter. As Mr. Baumann advised you, we can find no prior opinion of this office which deals with the precise question presented by you. However, we are enclosing copies of the following opinions concerning somewhat related problems:

Albert D. Nipper,	dated August 9, 1950
Robert L. Hoy,	dated October 21, 1952
James R. Reinhard,	dated September 30, 1955 ✓
Forrest L. Hill,	dated June 27, 1956. ✓

As we understand the situation, the count of the absentee ballots in the November 6 election in DeKalb County has been completed and whether the action taken was right or wrong, the results could not be changed except by an election contest. In this situation, and in view of the policy of this office not to write opinions with respect to matters involved in litigation, we do not feel that it would be appropriate for us to furnish an official opinion concerning the question presented by you.

Very truly yours,

JCB lc
4 enclosures

THOMAS F. EAGLETON
Attorney General

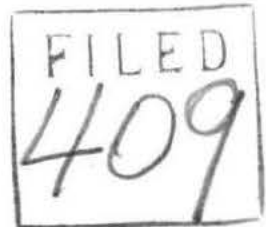
BALLOTS:
ELECTIONS:
ABSENTEE VOTING:

1. Official war ballots mailed prior to naming of nominee for county office by county political committee valid notwithstanding that no name placed on ballot for such office.
2. §112.030 prescribes written application for absentee ballot but absentee ballot procured by oral application not invalid.
3. §112.080, relating to challenging of absentee ballots, not modified by the adoption of §114.220, the local option county registration law.

OPINION NO. 409

November 19, 1962

Honorable Merrill E. Montgomery
Prosecuting Attorney
Sullivan County
Milan, Missouri



Dear Sir:

We have your letter of November 12, 1962, wherein you request an opinion of this office on three questions arising out of the general election held in Sullivan County on November 6, 1962.

1. Your first question involves the validity of several official war ballots. It appears that on August 22, 1962, following the primary election of August 6, 1962, the Republican candidate for county clerk nominated at such primary election withdrew his candidacy. On September 7, 1962, the county clerk had printed, and began to mail out, the official war ballots with no Republican nominee for the office of county clerk listed on the ballot. On September 11, 1962, the Republican County Committee met and nominated a candidate for this office whose name appeared on all ballots issued from that date.

It appears that at the time of the printing and mailing of the questioned ballots they were accurate, in that there was no Republican nominee for the office of county clerk. Due to the provisions of Section 112.330, RSMo 1959, the county clerk is required to cause the official war ballots for a general election to be printed within thirty days after the primary election, and under Section 112.370, RSMo 1959, he must mail them to the absentee voter "as soon as practicable" after the receipt of an application for such ballot. It therefore appears that the county clerk is simply performing the duties prescribed by law in mailing out these ballots prior to the nomination of a Republican candidate for county clerk. Moreover, these ballots were

Honorable Merrill E. Montgomery

correct at the time they were mailed and any omission was due solely to the delay of the Republican Committee in naming a candidate. To invalidate the ballots would cause the voter's franchise to be dependent upon the whim of a party committee, a result certainly not consistent with the letter and spirit of our election laws.

We also direct your attention to Section 111.650, RSMo 1959, which reads as follows:

"If a ballot should be found to contain a greater number of names for any office than the number of persons required to fill such office, it shall be considered as fraudulent as to the whole of the names designated to fill such office, but no further; but no ballot shall be considered fraudulent for containing a less number of names than are authorized to be inserted."

The above-quoted section lends further authority to our reasoning in holding that the questioned ballots are not invalid and should be counted.

2. It further appears that a number of persons desiring to vote an absentee ballot appeared in person at the office of the county clerk prior to the election and requested such a ballot, as provided in Section 112.020, RSMo 1959. However, we are informed that no formal written application was furnished to these persons and the absentee ballot was given to them on the basis of their oral application, that each of these persons voted the absentee ballot in the clerk's office at the time of application, and that the necessary affidavit was executed and the clerk's seal affixed. You now inquire whether such ballots must be invalidated due to the failure to make written application.

Section 112.030, RSMo, 1961 C.S., prescribes the manner in which an application is to be made for an absentee ballot. That section states, in part:

"Application for such ballot may be made on a blank signed by the applicant, to be furnished by the county

Honorable Merrill E. Montgomery

clerk or the board of election commissioners or other officer or officers charged with the duty of furnishing ballots as aforesaid, or may be made in writing by first class mail addressed to such officer or board signed by the said applicant. * * *

While the above-quoted section states that the application "may" be made on a blank furnished by the clerk, it does not appear that the term is used in a meaning which is permissive rather than compulsory. Rather, a careful reading of the statute indicates that the term "may" is used only because the statute provides two alternate methods of application. Thus, the application for an absentee ballot may be made on a blank furnished by the county clerk or it may be made in writing by first class mail. These, however, are the only alternatives provided and, by implication, all others are excluded. Further indication of the legislative intent in this regard can be found in the 1961 amendment of this statute (H. B. 435), wherein an additional requirement was inserted that the application blank must be "signed by the applicant." It is, therefore, our view that a written application for an absentee ballot is required when a voter appears personally at the office of the county clerk to make such application.

There remains the further question, however, of whether the failure to make written application for an absentee ballot invalidates the ballot. The general rule governing the construction to be given election statutes is found in the case of *Nance v. Kearbey*, 251 Mo. 374, 158 SW 629, 631, wherein the court said:

"First. Election laws must be liberally construed in aid of the right of suffrage. *State ex rel. v. Hough*, 193 Mo. loc. cit. 651, 91 S.W. 905; *Hale v. Stinson*, 198 Mo. 134, 95 S.W. 885. The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, 28 L.R.A. 502. The choice of

electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious because of a disregard of mandatory statutory safeguards.

"Second. The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. *Gass v. Evans*, 244 Mo. loc. cit. 353, 149 S.W. 628; *Hehl v. Guion*, 155 Mo. 76, 55 S.W. 1024. 'Such a construction,' says this court, speaking through Barclay, J., in *Bowers v. Smith*, 111 Mo. loc. cit. 55, 20 S.W. 101, 16 L.R.A. 754, 33 Am. St. Rep. 491, 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted, where the language in question is fairly susceptible of any other. *Wells v. Stanforth* (1885), 16 Q.B. Div. 245.' Again (pages 61, 62, of 111 Mo., page 105 of 20 S.W. [16 L.R.A. 754, 33 Am. St. Rep. 491]): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. *Ledbetter v. Hall* (1876), 62 Mo. 422. In the absence of such declaration, the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.'"

This office has had occasion to consider this principle on related questions involving irregularities in the preparation and casting of absentee ballots. In an opinion rendered August 9, 1950, to Albert D. Nipper, it was stated:

Honorable Merrill E. Montgomery

"Therefore, it is the opinion of this department that an absentee ballot cast by a person legally entitled to vote the same may be counted, although the county clerk might have solicited the application from the voter, taken the application from the voter at his home, and at the same time furnished the ballot, and upon its being voted has accepted it and has either returned it to the original county or has taken it and mailed the same to the clerk's office.

"We are further of the opinion that the fact that no list of applicants for absentee ballots has been posted as required by Section 112.03, House Bill No. 2050, Sixty-fifth General Assembly, does not render invalid such voter's ballot, and that such ballot may be counted. We are further of the opinion that such ballot may be counted although a particular applicant's name has been omitted from the list, although his postoffice address is not given, or although his street address is not given. We are further of the opinion that after ballots are deposited in the clerk's hands, they can lawfully be counted, although no list of voters is posted as required by Section 112.06, House Bill No. 2050, Sixty-fifth General Assembly, or where the name of a particular voter has been omitted from such list."

Similarly, in an opinion rendered by this office on October 21, 1952, to Robert L. Hoy, we held:

"Therefore, it is the opinion of this office that an absentee ballot cast by a person legally entitled to vote the same may be counted although such ballot may have been obtained more than thirty days prior to the election, Section 112.020, RSMo 1949, relating to time of application being directory only."

Honorable Merrill E. Montgomery

Finally, in an opinion dated June 10, 1954, to John P. Peters, this office held:

"It is our further opinion that when such [absentee] ballots are issued by the county superintendent of schools that such issuance is improper, but that it does not nullify such absentee ballots when they are properly cast, and that under such circumstances such absentee ballots should be counted, just as though they had been issued by the proper party."

From an examination of Sections 112.020 and 112.030 it can be seen that the Legislature has not specifically provided that the failure to make written application shall invalidate the ballot. Moreover, a comparison of the application you have furnished us with the affidavit required by Section 112.040, RSMo 1959, to be executed by one who votes an absentee ballot, shows that all the information requested in the former is found in the latter. Thus, if this information should be necessary in order to determine the right of an individual to vote an absentee ballot, it may be obtained from the affidavit. And, as pointed out in the authorities previously quoted, the law does not favor the destruction of the voter's franchise due solely to the omissions of officials charged with certain duties under the election laws. *State ex rel. School Dist. of Jefferson City v. Holman, Mo.*, 349 SW2d 945, 949. We therefore conclude that the ballots in question are not invalid due to the failure to make a written application.

3. You further inquire whether Section 114.220, RSMo 1959, modifies Section 112.080, RSMo 1959, regarding the challenging of an absentee ballot, by imposing an additional procedure upon that stated in Section 112.080. In reading these statutes together we do not see that there is any relation between the two. Section 114.220 relates to events occurring at the time a voter offers to vote on the day of election at the polling place and provides an expeditious procedure by which the qualifications of such voter can be challenged by any other registered voter and the matter quickly resolved. Section 112.080, on the other hand, has application only to the challenging of absentee votes and provides that such challenge may be made "for good cause."

Honorable Merrill E. Montgomery

It is our view that this latter statute is designed for a different purpose, and the judges are not limited by the requirements of Section 114.220 but may determine the qualifications of an absentee voter in whatever reasonable manner they in good faith deem proper and appropriate. For these reasons, it is our opinion that Section 112.080 is not modified by Section 114.220.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JJM:ml

December 13, 1962



Honorable T. D. McNeal
State Senator
2906 A Union Boulevard
St. Louis 15, Missouri

Dear Senator McNeal:

This refers to your letter of November 13, 1962, concerning your proposed resignation as State Senator from the 7th District upon your becoming State Senator from the 4th District pursuant to your election on November 6.

We know of nothing in the state constitution or statutes which expressly states the precise date upon which a person's term as state senator commences. We are inclined to the view that, in your case, your term as Senator from the 4th District would begin with the convening of the regular session of the general assembly on January 2, 1963, but we do not believe that it is necessary to reach a definite decision as to this matter.

It is our suggestion that some time during December, 1962, you submit your resignation to Governor Dalton by letter in substantially the following form:

"I hereby resign from my office as State Senator from the 7th Senatorial District effective at the beginning of my term of office as State Senator from the 4th Senatorial District pursuant to my election to the latter office on November 6, 1962."

If your resignation is made effective in this manner, without mention of a specific date, it is not apparent to us that any problem could arise.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

OPINION No. 413
answered by letter.

December 14, 1962



Dr. George A. Ulett
Acting Director
Division of Mental Diseases
722 Jefferson Street
Jefferson City, Missouri

Dear Dr. Ulett:

This refers to your letter of October 30, 1962, relating to a proposed transfer to the St. Joseph State Hospital of an involuntary patient who is in the Psychiatric Receiving Center in Kansas City for an indefinite period of hospitalization pursuant to an order of the Probate Court of Jackson County.

We agree with you that Section 202.823, RSMo 1959, should not be construed to authorize the Division of Mental Diseases to transfer a patient from the Psychiatric Receiving Center to a state hospital. We believe, instead, that this statutory provision should be construed only to authorize the Division of Mental Diseases to transfer patients between state hospitals which are under the administrative control of that Division.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JCB lc

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November 21, 1962

Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

We are in receipt of your request for an opinion as follows:

"In an opinion of October 26, 1951, issued to the Honorable Philip A. Grimes, Prosecuting Attorney of Boone County, prepared by Mr. D. D. Guffey and approved by Mr. J. E. Taylor, Attorney General, it was concluded, in part, that deputy assessors of third and fourth class counties are not covered under the provisions of the State Social Security Law. As a result of this opinion this office has refused coverage to such deputy assessors. Such cases have been processed by the Federal Social Security Agency as disagreement cases.

"With the passage of House Bill 635 of the last General Assembly, which became effective October 13, 1961, deputy assessors in third and fourth class counties have been covered. We are now being billed by the Federal Agency for contributions and interest covering periods prior to the passage of House Bill 635, and if we continue our policy of refusing payment I am sure it will be necessary for us to defend our position

in court. I am thus requesting that you review our position in light of the present statutes and advise this office of your recommendations in this matter."

In the opinion to Philip A. Grimes, referred to in your letter, this office concluded, in part, that deputy assessors in third and fourth class counties were not within the coverage of the Social Security Law under the provisions of Senate Committee Substitute for Senate Bill No. 3, enacted by the 66th General Assembly (Sections 105.300 to 105.440 RSMo). The basis of the ruling was that such deputies received no compensation from the county.

We have carefully reviewed the foregoing opinion and have concluded that it correctly states the applicable law. The enactment of House Bill 635, effective October 13, 1961, in no way changes the position of this office. If anything, the very fact that the General Assembly saw fit to broaden the definition of "employee" to make it cover county officers compensated wholly by fees derived from sources other than county funds evidences the legislative recognition that such officers were not theretofore covered as "employees" for the reason they receive no compensation from the county.

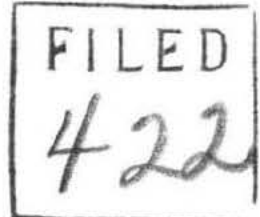
You have informed us that your request for an opinion is limited to the period prior to the passage of House Bill 635. Hence, we express no opinion as to whether the enactment of that Bill operated to bring deputy assessors of third and fourth class counties within the coverage of the Social Security Law effective October 13, 1961.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:sr

December 27, 1962



Honorable William J. Cason
Senator, Missouri Senate
215 East Franklin Street
Clinton, Missouri

Dear Senator Cason:

Your recent request for an opinion from this office involves an interpretation of Section 473.743, RSMo 1959. In particular, you ask the following:

"If the Public Administrator has been duly elected and qualified and has made his lawful and proper bond, and if a person dies in the county intestate and leaving property, and leaving no heirs or persons entitled to administer in this State, is it mandatory that the Probate Court appoint the Public Administrator as the Administrator of the estate if he makes timely and proper application or can the Probate Court appoint any other qualified person that he wishes."

We believe that under the circumstances which you describe, that the Probate Court can either appoint some other qualified person or he may appoint the public administrator. We believe that this is a matter within the sound discretion of the Probate Court. In *Tittman v. Edwards*, 27 Mo. App. 492, the Court held that the relationship of the public administrator and the probate court in appointing administrators was analogous to courts having concurrent jurisdiction and the assuming of jurisdiction by the probate court's appointment or the taking charge of the estate by the public administrator did fix the right to proceed.

Honorable William J. Cason

-2-

It is our understanding that as a practical matter the Probate Courts very commonly do appoint the public administrator in cases similar to the one you submit.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CB:ap

INSURANCE: Articles of Incorporation of proposed Old Reliable Fire Insurance Company are legally deficient and may not be certified under Section 379.040, RSMo 1959.

OPINION REQUEST NO. 424

December 20, 1962

Honorable Jack L. Clay,
Superintendent,
Division of Insurance,
Jefferson Building,
Jefferson City, Missouri .



Dear Mr. Clay:

This opinion is rendered in reply to your request of November 21, 1962, and touches the legal sufficiency of Articles of Incorporation of the proposed Old Reliable Fire Insurance Company. You have furnished this office with an executed copy of the Articles of Incorporation, together with proof of publication of the same as required by Section 379.040, RSMo 1959.

The declaration of intention of incorporators immediately preceding the formal Articles of Incorporation discloses the intention of the incorporators to:

"* * * organize an insurance company on the joint stock plan under the provisions of Chapter 379 of the Missouri Revised Statutes of 1959, for the purpose of doing a fire and property damage insurance business, * * *."

Section 379.040, RSMo 1959, requires that the declaration of intention of incorporators, along with the original Articles of Incorporation, are to be submitted to the Attorney General of Missouri for examination and he must determine if they are "in accordance with the provisions of sections 379.010 to 379.160, and not inconsistent with the constitution and laws of this state and the United States."

The declaration of intention states that the incorporators intend to "organize an insurance company on the joint stock plan under the provisions of Chapter 379 of the Missouri Revised Statutes of 1959." Since the company is to be formed on the "joint stock plan," we must assume that its formation will be accomplished in the light of specific provisions found at Sections 379.010 to 379.160, RSMo 1959.

Honorable Jack L. Clay

Section 379.035, RSMo 1959, designates what specific provisions shall be set forth in the Articles of Incorporation of a company formed on the joint stock plan and we here set forth such statute in its entirety:

"When such corporators propose to form a corporation for the purposes designated in section 379.010, on the joint stock plan, the articles of incorporation or association comprised in the declaration in section 379.030 shall set forth:

"(1) The name assumed by such corporation, and by which it shall be known;

"(2) The place where the principal office for the transaction of its business shall be located;

"(3) The specific kind or kinds of business which it proposes to transact;

"(4) The amount of its capital stock and the number of shares into which it shall be divided, and the manner in which it shall be paid up or secured;

"(5) The manner in which the corporate powers granted by this chapter shall be exercised, showing the number of directors, which shall not be less than nine nor more than twenty-five; and such other particulars as may be necessary to make manifest the objects and purposes of the corporation, and the manner in which it is to be conducted."

In seeking to comply with subparagraph (3) of Section 379.035, RSMo 1959, cited above, requiring that the Articles of Incorporation set forth "the specific kind or kinds of business which it proposes to transact", Article III of the Articles of Incorporation being examined treats this subject and is here set forth in full:

"The specific kind or kinds of business which it proposes to transact are:

"To make insurance on houses, buildings, mer-

Honorable Jack L. Clay

chandise, furniture and all kinds of real and personal property, against loss or damage by fire, lightning, hail, and windstorm, to cause itself to be wholly or partially reinsured against any loss arising from any risk which it may have undertaken, and to reinsure or guarantee any other insurer against loss arising from any risks that shall have been undertaken by such reinsurer, all in accordance with the authority and franchise granted by the Articles of Incorporation, and to write and issue policies upon a weekly and monthly industrial plan as well on other plans."

Under Article III of the Articles of Incorporation, quoted above, the incorporators designate in specific language that the corporation "will make insurance on houses, buildings, merchandise, furniture and all kinds of [of] real and personal property, against loss or damage by fire, lightning, hail and windstorm, * * *." We find such expressed purposes to be within the following language from Section 379.010, RSMo 1959:

"1. Any number of persons, not less than thirteen in number, a majority of whom shall be citizens of this state, may associate and form an incorporation, association or company for the following purposes, to wit:

"(1) To make insurance on houses, buildings, merchandise, furniture and all kinds of property, against loss or damage by fire, lightning, hail and windstorm * * *."

While Sections 379.010 and 379.015, RSMo 1959, authorize numerous additional risks to be insured by a joint stock company subject to Sections 379.010 to 379.160, RSMo 1959, the incorporators have chosen to limit the scope of their risks by the language quoted above from Article III of their Articles of Incorporation, and we do not challenge that portion of Article III. However, in Article III of the Articles of Incorporation, the incorporators have undertaken to clothe the corporation with power in the following language:

"* * * and to write and issue policies upon a weekly and monthly industrial plan as well on other plans."

Honorable Jack L. Clay

The declaration of intention specifically refers to Chapter 379, RSMo 1959, and discloses on its face a purpose to do a "fire and property damage insurance business". Article III of the Articles of Incorporation specifically adopts purposes set forth in sub-paragraph 1 (1) of Section 379.010, RSMo 1959. In view of such recitals we cannot escape the conclusion that the incorporators have endeavored to form a joint stock fire insurance company subject to the provisions found in Sections 379.010 to 379.160, RSMo 1959.

We here quote the following text from 44 C.J.S., Insurance Section 20, to demonstrate that insurance written on the industrial or prudential plan bears no affinity to fire insurance:

"Industrial insurance, which is sometimes designated people's insurance, prudential insurance, or family insurance, and which is said to have originated in the early guilds, friendly societies, and burial societies, is a plan of insurance under which small policies of accident, health, or life insurance are issued in consideration of weekly payments, in contradistinction to the ordinary plan of insurance, where premiums are payable annually, semiannually, or quarterly; a form of insurance written for a small limited amount payable at death, in consideration of a premium collected at short, fixed intervals; an insurance on the lives of the laboring classes for small amounts, the payments being made in weekly installments."

Sections 376.680 to 376.760, RSMo 1959, forming a portion of Missouri's Insurance code, have particular application to industrial and prudential insurance, and Section 376.680, RSMo 1959 is here set forth to further emphasize that industrial or prudential insurance is entirely foreign to fire insurance:

"Every life insurance company or association organized under the laws of this state for the purpose of carrying on and conducting an industrial or prudential life insurance business shall be governed by the provisions of sections 376.680 to 376.760."

Honorable Jack L. Clay

It must be concluded that language contained in Article III of the Articles of Incorporation of the proposed Old Reliable Fire Insurance Company seeking to confer authority on the corporation to write and issue policies of insurance on a weekly and monthly industrial plan contravenes the provisions of Sections 379.010 to 379.160, RSMo 1959, and is not consistent with the laws of Missouri.

Attention is next directed to subparagraph d) of Article VI of the Articles of Incorporation conferring power on the corporation in the following language:

"d) To purchase, organize, create, lease as lessor, lease as lessee, mortgage, encumber and otherwise convey or dispose of, manage, operate, control invest in or otherwise be financially interested in real estate and personal property, business ventures and facilities."

The powers expressed in paragraph d) of Article VI of the Articles of Incorporation are couched in the most general language which could have been employed, without reference to any statute of the Insurance Code as constituting a limitation on such powers. Employment of such general language may have been through inadvertence but such a general grant of powers without limitation cannot be viewed as being in accordance with the provisions of Sections 379.010 to 379.160, RSMo 1959, or even consistent with the laws of Missouri.

CONCLUSION

It is the opinion of the office that Articles of Incorporation, executed October 17, 1962 by original incorporators of the proposed Old Reliable Fire Insurance Company, are not drawn in accordance with the provisions of Sections 379.010 to 379.160, RSMo 1959, and are not consistent with the laws of Missouri, and consequently cannot be certified by this office as required by Section 379.040, RSMo 1959.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO:M: :mm

December 13, 1962

OPINION REQUEST NO. 428 ANSWERED BY LETTER

Honorable Garner L. Moody
Prosecuting Attorney
Wright County
Mansfield, Missouri



Dear Sir:

This is in response to your request of this office for an opinion dated November 27, 1962, as follows:

"I would like an opinion from your office on the following questions:

- "(1) Would the fact that the notary public who signed and sealed a ballot being voted, was one of the two witnesses who witnessed the mark of the voter on the envelope, invalidate the ballot?
- "(2) Would the fact that a duly commissioned notary public who was registered in the county in which an absentee ballot was cast, failed to show on the ballot the expiration of his commission, invalidate the ballot?"

The answer to question one is in the negative because Section 112.050, RSMo 1959, requires that the absentee ballot envelope be signed and sealed before a notary who is a witness to the act.

Honorable Garner L. Moody

The answer to question two is in the negative in view of Kansas City and S.E. Ry. Co. vs. Kansas City and S.W. Ry. Co., 31 S.W. 451, wherein it is stated that a notary's failure to certify as to the expiration of his term does not affect the validity of a deed. It is deemed that this is analogous and we believe the courts would hold the same way so as not to disenfranchise a voter.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

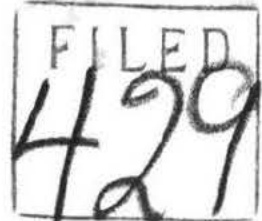
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COUNTY SUPERINTENDENT OF SCHOOLS:1. The qualified voters of
ELECTIONS: Pemiscot County should elect
SCHOOLS: a county superintendent of
VACANCY: schools at the annual district
SALARIES AND FEES: school meeting to be held on the
first Tuesday in April, 1963.
2. The State of Missouri will
contribute its share of the salary
to which the duly elected and
qualified county superintendent of
schools of Pemiscot County is en-
titled by statute.

December 6, 1962

OPINION
No. 429

Honorable Sidney H. Chaffin
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri



Dear Mr. Chaffin:

We have your letter of November 26, 1962, in which
you request an opinion of this office on two points,
which are:

- "(1) Whether an election should be
held next April to elect a
County Superintendent of Schools,
- "(2) If such officers is elected,
will the state contribute its
share of said officers salary
as provided by statute."

In answer to the first question we refer you to
Section 167.010, RSMo 1959, the first sentence of which
reads as follows:

"The qualified voters of each and
every county in this state shall
elect a county superintendent of
public schools at the annual dis-
trict school meeting held on the
first Tuesday in April, 1943, and
every four years thereafter."

This statute is still in force and effect, and,
following the language of this section it is obvious
that there should be an election in Pemiscot County to
elect a county superintendent of schools on the first
Tuesday in April, 1963.

In answer to your second question, we are enclosing
a copy of an opinion of this office issued on April 4, 1961,

to Honorable Elva D. Mann, Representative, Polk County, State Capitol Building, Jefferson City, Missouri. This opinion sets out that portion of the salary of the county superintendent of schools which is not payable in those counties where there are no common school districts and where the county superintendent of schools has no school districts under his supervision. In accordance with this opinion the state has declined to contribute those specified portions of the salary of the county superintendent of schools in those counties which fall within its application. Conversely, the state has and will contribute its share of the remaining portions of the salary of the county superintendent of schools as provided by statute.

For your information, we are also enclosing a copy of an opinion of this office issued on October 23, 1959, to Honorable Bill Davenport, Prosecuting Attorney, Christian County, Ozark, Missouri.

CONCLUSION

It is, therefore, the opinion of this office as follows:

1. That the qualified voters of Pemiscot County should elect a county superintendent of schools at the annual district school meeting to be held on the first Tuesday in April, 1963.
2. The State of Missouri will contribute its share of the salary to which the duly elected and qualified county superintendent of schools of Pemiscot County is entitled by statute.

This opinion, which I hereby approve, was prepared by my assistant Wayne W. Waldo.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

www/lo

December 27, 1962



Mr. William J. Theurer
Assistant City Counselor
Room 418, City Hall
St. Louis, Missouri

Dear Mr. Theurer:

Your recent request for an opinion is as follows:

"I would like an opinion as to whether or not it is the duty of the Public Administrator to take charge of the estates of these indigent patients, and I specifically refer to Section 473.743, Paragraph 8. Your opinion will be greatly appreciated."

Under the provisions of paragraph 8 of Section 473.743, RSMo 1959, the public administrator is authorized and has a duty to take charge of the estates of the persons to whom you refer if these persons have been held to be insane. It should be here noted that some of these indigent persons may have been committed to the mental institution under the Mental Illness Law. Committal under the Mental Illness Law, of course, does not establish legal insanity.

There is another important aspect of this matter, insofar as Social Security benefits are concerned. As indicated above, the public administrator has a responsibility in connection with these matters except where this is modified by Social Security regulations. Section 205J of the Social Security Act places the discretion regarding payments by that agency within the agency itself. This discretion is vested in the agency regardless of the legal competency of the recipient. In view of these pro-

Mr. William J. Theurer

-2-

visions, the Social Security agency does exercise its discretion and make direct payments to hospitals, nursing homes, or others for the benefit of the various prospective recipients.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CB:ap

PUBLIC SCHOOL RETIREMENT SYSTEM:

Public school retirement system contracts with servicers on FHA secured loans and procedures for handling foreclosures on such loans are proper and are approved.



December 20, 1962

OPINION REQUEST NO. 435 ANSWERED BY LETTER

Mr. G. L. Donahoe
Executive Secretary
Public School Retirement System of Missouri
Room 801, Jefferson Building
Jefferson City, Missouri

Dear Mr. Donahoe:

This is in answer to your letter of November 30, 1962. In your letter you call our attention to the investment of funds of the retirement system in accordance with the provisions of Section 169.040, RSMo 1959. The particular investments with which we are here concerned are the purchase of promissory notes by the retirement system which are secured by mortgages and insured by the FHA. In your letter you describe in detail the contract which is entered into between the retirement system and the seller of the promissory notes whereby the seller acts as servicer for the promissory notes secured by mortgages and insured by the FHA. Under this contract the servicer is responsible for instituting and carrying out any necessary foreclosures, including court proceedings, and the servicer is responsible for appropriate settlement with the Federal Housing Commissioner. After the foreclosure is complete the Public School Retirement System of Missouri indemnifies the servicer for the necessary costs and expenses, including reasonable attorneys fees which are incurred. The properties mortgaged to secure the promissory notes are located in a number of other states as well as in Missouri and a similar contract is in force with each servicer regardless of where the property is located.

We are mindful of the provisions of paragraph 20 of Section 169.020 which states:

Mr. G. L. Donahoe

"The Attorney General shall be the legal adviser of the board of trustees and shall represent the board in all legal proceedings."

We call attention to the fact that the type of investment described in your letter is specifically authorized by the provisions of paragraph 2 of Section 169.040. We assume that no member of the board of the retirement system has an interest in any company or firm which acts as servicer under the terms of the contract and that no member of the board profits directly or indirectly from any such investment and that these investments and the transactions in connection with them therefore do not come within the prohibition of Section 169.040, 3, RSMo Cum.Sup. 1961

Foreclosures which have been necessary in the past have been handled by the servicer in accordance with the terms of the contract with that servicer. Since the investment is specifically authorized by Section 169.040 and the contract with the servicer is an investment transaction authorized by the board, it is the opinion of this office that the contract with the servicer is proper and the procedures for handling foreclosures under the terms of the contract and as outlined in your letter are proper, and such procedures meet with our approval.

Yours very truly

THOMAS F. EAGLETON
Attorney General

WWW:1m

December 19, 1962



Honorable Maurice Schechter
State Senator
13th District
41 Country Fair Lane
Creve Coeur 41, Missouri

Dear Senator Schechter:

This is in reply to your letter of December 3, 1962,
and in further reply to your letter of October 25, 1962.

Your current inquiry asks specifically whether the pension plan could be administered by an insurance company in view of the fact that municipal funds will be involved. In response to this, we invite your attention to the sentence appearing on page 2 of our letter of October 31, 1962 to you: "In view of the unrestricted authority granted by Section 86.583, we know of no reason why provision for the pensioning of police and firemen pursuant to that section could not be accomplished by an arrangement with an insurance company."

Comparison of Section 86.583 with Section 25, Article VI, Constitution of 1945 reveals that the breadth of the authority granted by the former to municipalities such as Crestwood in no sense exceeds the authority granted by the latter to the legislature in making provisions such as appear in Section 86.583. Note the words of the cited section of our Constitution:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pen-

Honorable Maurice Schechter

2

sioning of the salaried members of
its organized police force or fire
department and the widows and minor
children of the deceased members.

. . . . "

We sincerely hope that the foregoing answers your question.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS lc

December 11, 1962



Honorable Clyde F. Portell
Representative
Ste. Genevieve County
14 Washington
Ste. Genevieve, Missouri

Dear Mr. Portell:

We have received your letter of December 4, 1962, in which you request an opinion of this office concerning school boards advertising for bids.

In answer to the first question in your letter we point out that Section 165.607, RSMo 1959, applies only to school districts in cities of 700,000 population or more. Therefore, this section applies only to the City of St. Louis and it would not apply to a school district in Ste. Genevieve County.

For your information, we are enclosing a copy of an opinion of this office issued on August 20, 1962, to Honorable Hubert Wheeler, Commissioner, Department of Education, Jefferson Building, Jefferson City, Missouri. This opinion holds that the general statute dealing with advertising for bids does not apply to school districts generally, and shows as an ancillary matter that Section 165.607 applies only to the City of St. Louis.

We are unable to find a statute comparable to Section 165.607 which would apply to school districts generally in Missouri located outside of St. Louis City and, therefore, the transportation of the school children in the school districts in Ste. Genevieve County will be governed by the general statutes concerning transportation of pupils, such as Sections 165.140 and 165.143, RSMo 1959, and the payment for the transportation of school children would be governed by the general statute covering the disbursement of school moneys, which is Section 165.110, RSMo 1959.

Very truly yours,

WWW lc
1 enclosure

THOMAS F. EAGLETON
Attorney General

OPINION REQUEST NO. 442
ANSWERED BY LETTER (Bushman)

December 18, 1962



Honorable Paul E. Williams,
Prosecuting Attorney
Pike County,
Bowling Green, Missouri

Dear Mr. Williams:

You recently wrote us a letter wishing to know whether the Sheriff of Pike County was entitled to a fee of ten cents per mile or fifteen cents per mile in civil cases.

In reading through the statutory provisions on this subject we call your attention to Section 57.280, RSMo 1959, which specifically provides that sheriffs are to receive ten (10) cents

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

I think this will answer the question stated in your letter.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGB:MW

COUNTIES:
COUNTY HEALTH CENTER:
HEALTH CENTER:
ELECTIONS:
VOTES:

Persons receiving highest number of votes in election for county health center trustees are elected, whether their names appear on ballot or whether they are written in by voters. If elected person refuses to accept office, person with next greatest number of votes is not elected; rather, a vacancy exists which is filled by appointment.

December 27, 1962

OPINION No. 443

Honorable William C. Batson, Jr.
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri



Dear Mr. Batson:

Your opinion request of December 7, 1962 reads as follows:

"At the last election on November 6, 1962, a ballot was submitted to the voters to elect three trustees for the Board of Butler County Health Service; however, only one man filed his candidacy as required by Section 205.041 and only his name was put on the ballot. There were a number of lines submitted on the ballot in blank with squares at the side and some 125 names were written in of different people, and of course, there were a number of votes for the same persons and the remaining number needed could be selected from this write-in group; however, the question has arisen as to whether on this type of ballot the names written in in that manner can be elected members to the Board of Trustees.

"Our problem is 1) Under Section 205.041, does the County Court appoint the remaining 2 trustees as this Section reads because only one man filed for his candidacy and got his name on the official ballot or does the County Court take the 2 that received the most

Honorable William C. Batson, Jr.

votes in order to fill the remaining offices? 2) If they take office from those names that were written in, if those receiving the greatest number of votes do not desire to take office, does the County Court then select the next names in line that receive the next greatest number of votes?"

As we read your request, we understand that the candidate whose name appeared on the ballot was one of three persons receiving the highest number of votes. Consequently, we will confine our consideration to the other two.

Subsection (1) of Section 205.041, RSMo 1959, reads:

"Each candidate for the office of health center trustee shall file with the county clerk an announcement of candidacy in writing not later than thirty days before the general election. The announcement shall indicate whether the individual is a candidate for a full or an unexpired term of a named predecessor. No filing fee shall be required to be paid upon the filing of any announcement. If announcements of a sufficient number of trustees are not filed, the county court shall appoint such trustee or trustees as may be necessary to fill all vacancies on the board which result from the expiration of the term of any trustees and any such appointee shall serve until the next general election when a trustee shall be elected to fill the remainder of the unexpired term."

Subsection (2) of Section 205.041 then provides that the "county court shall prepare a ballot containing the names of all candidates who have announced for trustee"

However, we do not believe that the failure of a person to formally announce disqualifies him from subsequently being elected if he receives the required number of "write in" votes. Note the words of the opening sentence of Subsection (3) of Section 205.041:

Honorable William C. Batson, Jr.

"(3) Such ballots shall be furnished to the election officials of each precinct in the county and shall be voted by the qualified voters therein in the same manner as other ballots are furnished and voted." (Emphasis supplied.)

To determine in what manner "other ballots are furnished and voted," we turn to Section 111.580, RSMo 1959. Subsection (2) thereof reads as follows:

"2. All candidates of the party whose circle is marked shall be counted as voted for excepting where squares are crossed preceding the names of the candidates in other columns. If two or more candidates for the same office are thus designated, neither shall be counted. If the cross (X) is not placed in the circle immediately below the party name at the head of the column, but does appear in the squares opposite the various candidates' names, then only these names shall be counted for, and none other. A cross (X) mark is any line crossing any other line at any angle within the voting space, and no ballot shall be declared void because a cross (X) mark therein is irregular in form."

In an opinion of this office issued to Arthur U. Goodman, Jr., on September 23, 1944, it was held that under the foregoing subsection a "write in" vote could be cast notwithstanding the fact that there had been no nomination for the particular office in question. We forward a copy of that opinion together with an opinion issued to Emory L. Melton on September 28, 1948, which enunciated essentially the same rule.

We are of the opinion that, since the law relating to general elections obtains in elections of county health center trustees at least as to the procedure for marking ballots, "write in" votes are valid and that such trustees may be elected by them. We find no conflict between this holding and the provision in Subsection (1) of Section 205.041, to the effect that where a sufficient

Honorable William C. Batson, Jr.

number of candidates fail to announce, the county court appoints trustees to fill the vacancies not sought by candidates who then hold office until the next general election. We believe this provision was intended to provide for a situation where there was not only an insufficient number of announced candidates, but also an absence of "write in" votes.

Failure to file as set out in Section 205.041 may prevent a candidate from having his name printed on the ballot, but it should not prevent the voters from exercising their choice as freely as possible. (See attached opinions.)

Your next question is directed to the contingency that the persons selected by "write in" votes may refuse to serve as trustees, and you ask whether the persons receiving the next highest number of votes would then be regarded as elected.

The answer to this question is negative. Subsection (3) of Section 205.041 states in part:

" * * * The candidates receiving the highest number of votes for the offices of trustee to be filled shall be declared elected by the county court which shall issue commissions to the elected trustees."

In State ex rel. Chilcutt v. Thatch (Mo. Sup., 1949), 221 S. W. 2d 172, an unsuccessful candidate in a general election sought to have himself declared elected upon the grounds that his opponent, who polled a majority of the votes in the general election, was not properly nominated. The question before the Supreme Court was whether the unsuccessful candidate could present a justiciable controversy so as to have the matter decided by declaratory judgment.

In holding that the unsuccessful candidate had no legally cognizable interest, the Court said, l. c. 174:

"Even if it were conceded, which Chilcutt does not concede (contending the contrary), that Chilcutt was not entitled to have his name on the ballot,

Honorable William C. Batson, Jr.

it has long been the law in Missouri that even though a majority of the voters voting at an election vote for one not entitled to have his name printed on the ballot because of an irregularity in his nomination, the candidate who receives the next highest number of votes (less than a majority) in any event is not entitled to the office. To be entitled to the office a candidate must receive a majority or plurality, whichever the particular statute requires, of the entire number of votes cast. State ex rel. Attorney General v. Vail, 53 Mo. 97; Sheridan v. City of St. Louis, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480; State ex rel. Neu v. Waechter, 332 Mo. 574, 58 S. W. 2d 971; State on inf. of McKittrick, Attorney General v. Cameron, 342 Mo. 830, 117 S. W. 2d 1078; Mansur v. Morris, 355 Mo. 424, 196 S. W. 2d 287. See also, 133 A.L.R. 333. As above noted, Pickel, not having received a majority of the votes at the general election, can not be issued the certificate of election. The Circuit Court in any event would not have had any jurisdiction to order the county clerk to issue to Pickel a certificate of election."

Hence, our conclusion must be that if the persons receiving the highest number of votes refuse to serve, vacancies exist which must be filled by the County Court as provided by Section 205.031(4):

"4. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be

Honorable William C. Batson, Jr.

filled by election of a trustee to serve during the remainder of the term of his predecessor."

CONCLUSION

It is the opinion of this office that the three persons receiving the highest number of votes in the election to fill three vacancies on the board of trustees of a county health center whether such votes are "write in" or whether the candidates' names were printed on the ballot, are the persons elected. In the event that any person so elected refuses to accept his office, his office shall be deemed vacant and the vacancy shall be filled as provided in Section 205.031(4).

This opinion, which I hereby approve, was prepared by my assistant Albert J. Stephan, Jr.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS lc
2 enclosures

December 17, 1962



Honorable Thomas A. Walsh
Representative, State of Missouri
5850 Elizabeth Avenue
St. Louis 10, Missouri

Dear Mr. Walsh:

Regarding your letter and the payment of the wages of an employee of a corporation, I direct your attention to a statute passed by the 1955 General Assembly. Section 290.080 reads in part as follows:

"All corporations doing business in this state, and all persons operating railroads or railroad shops in this state, shall pay the wages and salaries of their employees as often as semimonthly, within sixteen days of the close of each payroll period;
* * *"

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TFE:jh